REPORT

ON

CONTRIBUTION AMONG WRONGDOERS AND CONTRIBUTORY NEGLIGENCE

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

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H. Allan Leal, OC, QC, LSM, LLM, LLD, DCL, *Vice Chairman*

Earl A. Cherniak, QC

J. Robert S. Prichard, MBA, LLM

Margaret A. Ross, BA (Hon.), LLB

M. Patricia Richardson, MA, LLB, is Counsel to the Commission. The Commission's office is located on the Fifteenth Floor at 18 King Street East, Toronto, Ontario, Canada, M5C 1C5

The Commission wishes to acknowledge the contribution of four former Commissioners: Dr. Derek Mendes da Costa, QC, SJD, LLD, former Chairman of the Commission, Hon. Richard A. Bell, PC, QC, LLD, Mr. William R. Poole, QC, and Mr. Barry A. Percival, QC, whose tenure at the Commission extended through much of this Project.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Contribution Among Wrongdoers and Contributory Negligence*.

CHAPTER 1

INTRODUCTION

This Report is concerned principally with the rights and obligations, as between themselves, of persons whose wrongful conduct has caused a single loss to another. Such persons are commonly called "concurrent wrongdoers", since their wrongful acts concur, or coincide in some way (although not necessarily contemporaneously), to give rise to a single loss, that is, a loss that cannot be divided so that part may be attributed to one wrongdoer and part to another wrongdoer. The bundle of rights and obligations of concurrent wrongdoers as between themselves—or, more accurately, the right of one concurrent wrongdoer, who has paid more than his lawful share of the damage award, to obtain compensation from the other wrongdoer—is referred to generally as the "right to contribution".

Our review of rights of contribution and related matters has revealed a number of deficiencies in the present law. Given their importance, brief mention of the most critical issues seems appropriate here.

Before doing so, however, we wish to emphasize the fundamental, unifying principle that lies behind contribution and other allied rights, namely, the restitutionary principle of unjust enrichment, which compels the non-paying concurrent wrongdoer to pay for the benefit he received as a result of the full or partial satisfaction of the injured person's judgment by another concurrent wrongdoer. Our assessment of the utility of the present law, and of various alternatives for reform, is influenced largely by the centrality of this restitutionary principle.

Bearing this overarching principle in mind, the Commission examines in some detail the nature and scope of existing rights to contribution among concurrent wrongdoers.

One of the most substantial defects in existing law is the limited, and ambiguous, scope of the *Negligence Act*[1]—the main legislative enactment governing contribution—whose purview is restricted to concurrent tortfeasors (and perhaps not even all tortfeasors). In the Commission's view, the general absence of a right of contribution in the case of non-tortious conduct unjustifiably allows the injured person to choose one concurrent wrongdoer to bear the entire loss.

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[1] *Negligence Act*, R.S.O. 1980, c. 315.

Tested against prevailing restitutionary principles, this exclusion of other kinds of civil liability—for example, breach of contract—is untenable. Having regard to the restrictions and uncertainties in existing law, the difficulties experienced by courts in establishing a coherent set of rules on a case-by-case basis, and the likelihood of discrepancies between the statutory rights of tortfeasors and the non-statutory rights of other wrongdoers, there is a compelling case for a legislative solution.

Once it has been concluded that a right of contribution ought to exist among all concurrent wrongdoers, it becomes essential to grapple with the many complex intricacies of contribution law. While existing law may well deal satisfactorily with one or more aspects of contribution, substantial reform in many areas is needed, particularly in light of the expansion of the right of contribution discussed above. Difficult and controversial issues—involving, for example, the relationship between settlements and contribution claims, contractual and other defences to such claims, the effect of limitation periods *vis-à-vis* each concurrent wrongdoer, the assessment of contribution, the legal basis of apportioning loss between concurrent wrongdoers, and the execution of contribution orders—must, we believe, be re-examined and resolved.

While this Report focuses mainly on the right to contribution among concurrent wrongdoers, it considers three further, related matters. The first pertains to the rights, not of the wrongdoers as between themselves, but of the injured person whose loss has been caused by two or more concurrent wrongdoers. From this perspective, we shall discuss the two classes of concurrent wrongdoers, namely, "joint" concurrent wrongdoers, "where there is not only a concurrence in the chain of causation leading to the single damage but also...mental concurrence in some enterprise",[2] and "several" concurrent wrongdoers, "where the concurrence is exclusively in the realm of causation".[3]

At common law, four consequences flowed from the distinction between joint and several concurrent liability. Most of these distinctions have now been superseded by legislation. However, one of them continues to apply and, as well, some further anomalies still exist. The holdovers from the common law are, in our view, entirely unjustifiable and ought no longer to govern.

A second critical issue, also relating to the rights of an injured person against concurrent wrongdoers, concerns the liability *in solidum* of each joint or several concurrent wrongdoer. A fundamental principle of the common law is that a plaintiff's right to recover damages for the whole loss caused by the wrongful conduct of one concurrently liable defendant is not diminished by the fact that the plaintiff may also be entitled to sue another concurrently liable defendant for that loss. Hence, each concurrent wrong-

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[2] Williams, *Joint Torts and Contributory Negligence* (1951), at 1.

[3] *Ibid.*

doer is liable *in solidum*, for the whole loss, as if there were no other wrongdoer against whom the injured person has a claim (although clearly the injured person may not recover damages that exceed the total amount of the loss). Liability *in solidum*, which existed at common law and continues today in Ontario under the *Negligence Act*,[4] gives rise to claims for contribution by one concurrent wrongdoer against another, the principal subject matter of this Report.

A heated debate has raged for some time concerning the desirability of retaining the principle of *in solidum* liability, particularly in the context of the so-called liability insurance "crisis" in Ontario. But commentators assail or justify the principle also from the perspective of "fairness" to defendants (especially where all but one of the concurrently liable wrongdoers are insolvent), the deterrence of activity that may harm others, and the operation of the tort system as a whole.

With respect to the insurance issue, detractors argue that the operation of the principle has broad socio-economic consequences. It is said that injured persons seek out "deep pocket" defendants—that is, those who are the most solvent or best insured—which in turn allegedly compels such defendants to settle, well in excess of their proportionate liability. Such settlements are reflected in higher insurance premiums, which then affect the provision of goods and services to the public by increasing their cost and reducing their availability. It is the legitimacy of this argument, as well as others, to which we direct our attention.

The third topic that relates to, but is not directly concerned with, the right of contribution is the effect of the plaintiff's contributory negligence or "fault" on the liability to the plaintiff of a single wrongdoer or concurrent wrongdoers.

Section 4 of the *Negligence Act* provides for a power of apportionment in the case of a plaintiff and a defendant. However, its coverage is limited, since it speaks only in terms of the "fault or negligence" of both parties. Just as in the case of contribution, then, there is a need to re-examine the scope of the legislation: consideration must be given to the role, if any, of apportionment in the context of intentional torts, defamation, fraud, breach of contract, and breach of a statutory or fiduciary duty.

In considering the various issues that arise in our study of contribution and related matters, particular attention is paid to the 1984 *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of

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[4] *Supra*, note 1, s. 2. In this connection, see Williams, *supra*, note 2, at 3-4 and 5, and Cheifetz, *Apportionment of Fault in Tort* (1981), at 7. Section 2 of the *Negligence Act* is somewhat confusing on this point, since it provides that, "where two or more persons are found at fault or negligent, they are *jointly and severally liable*" to the injured party. As we shall see *infra*, ch. 2, sec. 2(a), this language was intended simply "to declare that the liability of concurrent tortfeasors is *in solidum*, and no operation should be given to the legislation beyond this": Williams, *supra*, note 2, at 6.

Canada.[5] We do so both in order to take full advantage of the research of the Alberta Institute of Law Research and Reform, on which the Uniform Act is based,[6] and because, in the interests of uniformity, the provisions of that Act ought, at the very least, to be given serious consideration.

Our review of the law governing the rights and obligations, as between themselves, of concurrent wrongdoers, as well as the rights of the injured person *vis-à-vis* such wrongdoers and the effect of the injured person's contributory negligence, reveals a tension between the desire to protect the interests of injured persons and the need to deal fairly with concurrent wrongdoers. This tension inevitably gives rise to dramatically different perspectives on each issue; it also serves to explain the often highly sophisticated and subtle arguments marshalled on behalf of one alternative for reform or another.

More frequently than not, a perfect solution, which meets to the full the interests of all parties, cannot be reached. We believe, however, that the reform measures fashioned in this Report strike a reasonable and equitable balance between competing objectives.

In some instances, statutory reform of existing common law is envisaged; in other instances, where existing legislation—mainly the *Negligence Act*—is seen to be inadequate, statutory change of that legislation is proposed. In any event, whether a legislative solution is recommended, or whether the law would be allowed to develop on a case-by-case basis, without express statutory assistance, the Commission is of the view that the law in this area must be rationalized. As part of this process, we recommend the repeal of the *Negligence Act* and the enactment of a new *Contribution and Comparative Fault Act* to deal comprehensively with the matters referred to above.[7]

Before turning to our discussion of the law and our proposals for reform, two matters relating to terminology need to be addressed.

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[5] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

The Uniform Act was first adopted in 1924 and revised in 1935 and 1953. See *Proceedings of the Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1934), Appendix B; *Proceedings of the Eighteenth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1935), Appendix E; and *Proceedings of the Thirty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953), Appendix I.

[6] See Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979). See, also, the Institute's Working Paper: *Contributory Negligence and Concurrent Tortfeasors* (1975).

It should be noted that the former Uniform Act (see *supra*, note 5) remains in force in Alberta. See the Alberta *Contributory Negligence Act*, R.S.A. 1980, c. C-23.

[7] The proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act") appears as an Appendix of this Report. See, especially, s. 23, which deals with the application of the Act, and s. 24, which repeals the *Negligence Act*.

As we shall see in chapter 4, rights of contribution may arise by statute, at common law, in equity, or by contract. In many instances—indeed, under the Ontario *Negligence Act*—a right of "contribution" is juxtaposed in the same section with a right to "indemnity".[8] Where the statutory or contractual provision referring to "contribution and indemnity" is intended to provide for the case where one concurrent wrongdoer may recover a sum from another concurrent wrongdoer after the former has paid to the injured person more than his lawful share of the damages, the reference to an "indemnity" is simply a reference to full, or 100 percent, contribution. In these cases, the terms "contribution" and "indemnity" are both used where one concurrent wrongdoer is more at fault or more negligent than another, and where the determination of the rights of the wrongdoers, as between themselves, involves a comparison of their respective degrees of fault or negligence. In this Report, the Commission will use the term "contribution" to refer to cases of this sort, including where a court orders one wrongdoer to pay 100 percent contribution, or no contribution, to another. In this context, therefore, we shall not refer to "indemnity" to mean simply 100 percent contribution.[9]

The term "indemnity" has, however, a meaning other than the one discussed above. More narrowly defined, it refers to the case where two persons are liable for the same debt or damages, but the liability of one is primary and the liability of the other is secondary. Where the person primarily liable defaults in his obligation, and the person secondarily liable pays in his stead, as in the classic case of a guarantee, the payor may normally seek "indemnity" from the other; that is, in the absence of any contractual provision to the contrary, for example, the payor may recover full compensation from the person primarily liable. Unlike in the case of contribution, the determination of indemnity claims is based not on comparative fault or negligence, but on the nature of the relationship between the parties. It is in the above sense, then, that we shall use the term "indemnity" in this Report. We shall return to the right to indemnity in chapter 4, where we discuss, among other things, the application of our recommendations to such a right.[10]

The second terminological point concerns the short-hand designation of the parties to whom our reform proposals relate. Throughout this Report,

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[8] Under s. 2 of the *Negligence Act*, each concurrent tortfeasor is liable "to make contribution and indemnify each other". Section 2(4) of the *Dog Owners' Liability Act*, R.S.O. 1980, c. 124, for example, refers to a right "to recover contribution and indemnity". Other statutory, and contractual, examples may be found.

[9] See Williams, *supra*, note 2, at 80: "Where the contribution is of the whole of the sum so paid it is referred to specifically as an indemnity". Williams continues as follows (*ibid.*, *n.* 1): "It is convenient to take 'contribution' to include indemnity, and the word is so used in the Tortfeasors Act. Some judges and writers, however, treat them as distinct;... It is frequently convenient to speak of 'contribution or indemnity,' here using the word contribution in the narrower sense".

With respect to the power of a court to order 100%, or no, contribution, see Draft Act, s. 9(2).

[10] See Draft Act, s. 7(3).

the person sustaining the loss is designated as "P"; the person against whom P may have a cause of action in respect of that loss, and who claims contribution, is designated as "D1"; and the person against whom P may have a cause of action for the loss, and against whom D1 claims contribution, is designated as "D2".

The Commission wishes to express its gratitude to the Project Director, Professor John M. Evans, of Osgoode Hall Law School, York University. Professor Evans' deep understanding of this difficult and important area of the law is evident throughout this Report, and his cooperation and patience during all stages of the Project is most sincerely appreciated. We also wish to record our thanks to Professor Stephen M. Waddams and Professor J. Bruce Dunlop, both of the Faculty of Law, University of Toronto, for their preparation of material relating to the effect of a plaintiff's contributory fault on the liability of single and concurrent wrongdoers.

In order to understand more fully the debate concerning *in solidum* liability, we commissioned a research paper from Professor George L. Priest, the John M. Olin Professor of Law and Economics, Yale Law School. In March, 1987, the Commission met to discuss the paper and, more generally, to consider the question whether the current rule of *in solidum* liability should be abolished or modified. The Commission was greatly assisted by the participation of a number of prominent academics in the field of tort law, to whom we wish to express our appreciation. These participants were Professor Priest; Professor Marc Galanter, of the School of Law, University of Wisconsin; Professors Michael J. Trebilcock, Stephen M. Waddams, and Ernest J. Weinrib, of the Faculty of Law, University of Toronto; and the Project Director, Professor John Evans.

Finally, the Commission wishes to acknowledge the invaluable contribution of Mr. Arthur N. Stone, Q.C., former Senior Legislative Counsel for Ontario. Mr. Stone drafted the Commission's proposed *Contribution and Comparative Fault Act*.

RECOMMENDATION

The Commission makes the following recommendation:

The *Negligence Act* should be repealed and a new *Contribution and Comparative Fault Act* should be enacted to deal comprehensively with the rights and obligations, as between themselves, of concurrent wrongdoers, the rights of the injured person *vis-à-vis* such wrongdoers, and the effect of the injured person's contributory fault on the issue of liability.

CHAPTER 2

JOINT AND SEVERAL LIABILITY

1. INTRODUCTION

While "[t]he modern tendency has been to assimilate to a considerable extent the position of joint tortfeasors and several tortfeasors whose acts concur to produce the same damage, . . . some differences remain".[1] This chapter describes the characteristics of joint concurrent wrongdoers and several concurrent wrongdoers, whether the damage was caused by a tort, or a breach of contract or trust, or some combination. It then discusses the essential differences between these two classes of concurrent wrongdoers, and proposes recommendations for reform.

In the following section, we begin with an examination of the law pertaining to joint and several tortfeasors. It bears noting at the outset that the law in this area, as well as the law relating to concurrent contract breakers, is dominated almost exclusively by common law principles. Until recently, few legislative inroads have been made.

2. PRESENT LAW

(a) JOINT TORTFEASORS AND SEVERAL TORTFEASORS

At common law, two or more tortfeasors whose conduct has caused damage to another person may be concurrently liable (either jointly or severally) or non-concurrently, and therefore only severally, liable. Glanville Williams, the leading commentator on concurrent wrongdoing, describes these three classes of tortfeasors as follows:[2]

> The term 'joint tortfeasor' is, in essence, well understood. Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.

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[1] Williams, *Joint Torts and Contributory Negligence* (1951), at 1.

[2] *Ibid.*

> Where tortfeasors are not joint they are necessarily 'several', 'separate', or 'independent'. Several (*i.e.* separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage, and several tortfeasors whose acts cause different damage.

As indicated, this Report is concerned with the rights, as between themselves, of *concurrent* tortfeasors—that is, persons whose conduct causes a single loss to another; it is not concerned with non-concurrent, several tortfeasors, whose acts produce different damage to the same individual. Nevertheless, in order to highlight the nature of the liability of concurrent tortfeasors, two essential differences between concurrent tortfeasors (both joint and several), on the one hand, and non-concurrent, several tortfeasors, on the other, should be noted.[3]

First, each of two or more concurrent wrongdoers, whether joint or several, is liable *in solidum* for the whole of the loss suffered by P.[4] However, in the case of non-concurrent, several tortfeasors, whose acts have produced different damage, each tortfeasor is liable to P only for the damage he has caused. P's "total damage must therefore be apportioned between the defendants" who are severally, but not concurrently, liable.[5] Secondly,

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[3] Williams distinguishes between concurrent tortfeasors and others in the following way (*supra*, note 1, at 3-4):

> (1) Concurrent tortfeasors are, unlike other tortfeasors, liable in full for damage done by all, and it does not matter whether the concurrence is joint or merely several.
>
> ....
>
> (2) Concurrent tortfeasors may generally be joined as co-defendants in an action....In proper circumstances other tortfeasors may similarly be joined; but the general principle is that non-concurrent tortfeasors must be sued separately.
>
> (3) Since concurrent tortfeasors are responsible for the same damage, satisfaction by one discharges all....This is not true for other tortfeasors.
>
> (4) There is a certain right of contribution between concurrent tortfeasors, but not generally between others....

[4] See Williams, *ibid.*, at 1 and 5, discussing the common law position, and *Negligence Act*, R.S.O. 1980, c. 315, s. 2. See *supra*, ch. 1, note 4, and, in more detail, *infra*, ch. 3.

[5] Williams, *supra*, note 1, at 20, and, generally, at 20-23.

> The question whether several tortfeasors are or are not concurrently liable, and therefore the question whether the damages can be divided, or apportioned, is one of fact. It appears that no clear test as to when damages will be considered divisible has been developed by either the courts or academic commentators in Britain, Canada, or the United States. Fleming states that "[w]hether injury is susceptible to apportionment seems to depend on pragmatic, rather than theoretical, considerations" (Fleming, *The Law of Torts* (5th ed., 1977), at 187). Prosser and Keeton are of the view that the question of divisibility of harm is not primarily one of causation, "but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes" (Dobbs, Keeton, and Owen (eds.), *Prosser and Keeton on the Law of Torts* (5th ed., 1984) (hereinafter referred to as "Prosser and Keeton"), at 345).

because concurrent tortfeasors are responsible for the same damage, satisfaction by one discharges them all.[6] Accordingly, as we shall see in chapter 4, there may be rights of contribution between such wrongdoers. In the case of non-concurrent, several wrongdoers, on the other hand, no issue of contribution can arise, since neither defendant is legally responsible for the damage caused by the other.

We now turn to the main focus of our discussion, the distinction between joint and several concurrent tortfeasors. It will be recalled that the essential difference between the two is that, while in both cases there is a coincidence in the chain of causation leading to the same damage, in the case of joint tortfeasors it has been said that generally there is, in addition, some type of mental concurrence in some enterprise.[7] The injured party has the same cause of action against joint tortfeasors, but different, independent causes of action against several, concurrent tortfeasors.

The distinguishing features of the three classes of joint (as opposed to several) concurrent tortfeasors referred to by Williams, and reproduced above, need not detain us unduly.[8] The general principle of joint liability in the context of vicarious liability, including principal and agent and master and servant, has not created much difficulty, despite occasional authority to the contrary. Nor has the notion that, where a breach of a statutory or other

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Williams, Fleming, and Prosser and Keeton all rely on illustrative examples from various cases to indicate in what circumstances finders of fact, whether judges or juries, have determined that a certain damage is or is not divisible. Prosser and Keeton are less than illuminating when they state that "[t]he distinction is one between injuries which are reasonably capable of being separated, and injuries which are not" (*ibid.*, at 314). Nevertheless, Williams refers to the following illustration by Prosser of the notion or process of divisibility (Williams, *supra*, note 1, at 17, quoting from Prosser, *Handbook of the Law of Torts* (1941), at 328):

> If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury, and each will be liable for all of it. If they shoot him independently, with separate guns, and he dies, there can still be no division, for death cannot be apportioned except by an arbitrary rule. If they merely inflict separate wounds, and the plaintiff survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries. There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant [liable] for the wound inflicted by the other. Upon the same basis, if two defendants each pollute a stream with oil, it is possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff's barn.

[6] Williams, *supra*, note 1, at 3, reproduced *supra*, note 3 (para. 3).

[7] Williams states that "[e]xcept in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose" (*supra*, note 2, at 1).

[8] See, generally, *ibid.*, at 6-16.

duty imposed on two or more persons is a tort, the wrongdoers are joint tortfeasors.[9] However, difficulty has occasionally arisen in determining whether there has been a joint purpose or "concerted action to a common end",[10] and not merely "a coincidence of separate acts which by their conjoined effect cause damage".[11]

Williams indicates that concerted action to a common end means, broadly speaking, a "conspiracy where all the conspirators are active in the furtherance of the wrong".[12] In a commonly cited case,[13] where the plaintiff was set upon by three men, one of whom committed battery, one of whom committed false imprisonment, and one of whom committed robbery, all were held liable for the entire damage.

However, Williams cautions that the term "conspiracy" does not necessarily mean that the tortfeasors realize they are committing a tort, let alone that there be an express agreement to do so.[14] An example of a joint negligent tort would be a case in which two drivers are racing on a highway and one driver kills a third person. Williams states that, under these circumstances, the second driver "probably" would be liable for the damage caused by the act of the first, even though the second driver had retained control of the car at all times and injured no one.[15] Another commonly cited example of a joint negligent tort involved a landlord and the landlord's tenant, both carrying candles, looking for a gas leak. The tenant struck a match, causing an explosion. The landlord and the tenant were held jointly liable for the damage, since they were acting together and assisting each other in attempting to locate the leak.[16]

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[9] *Ibid.*, at 6-9.

[10] *The Koursk*, [1924] P. 140, at 151, [1924] All E.R. Rep. 168 (C.A.) (subsequent reference is to [1924] P.).

[11] *Ibid.*, at 160.

[12] Williams, *supra*, note 1, at 10. The principle appears to have been first stated in *Heydon's Case* (1612), 11 Co. Rep. 5a, 77 E.R. 1150, at 1151 (K.B.), where it was said that "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present".

[13] *Smithson v. Garth* (1691), 3 Lev. 324, 83 E.R. 711 (K.B.), cited by Williams, *supra*, note 1, at 3. See, also, Fleming, *supra*, note 5, at 238, and Prosser and Keeton, *supra*, note 5, at 323.

[14] Williams, *supra*, note 1, at 10.

[15] *Ibid.*, at 13. See *McDonald v. Dalgleish*, [1973] 2 O.R. 826, 35 D.L.R. (3d) 486 (H.C.J.).

[16] *Brooke v. Bool*, [1928] 2 K.B. 578. For a recent example, see *Bushell v. Hamilton* (1980), 39 N.S.R. (2d) 691, 113 D.L.R. (3d) 498 (S.C., App. Div.) (defendants liable as joint tortfeasors for damage caused by a fire lit in the course of a joint venture). See, also, *Beecham v. Henderson and Houston*, [1951] 1 D.L.R. 628 (B.C.S.C.); *Harpe v. Lefebvre, Belcourt and Meunier* (1976), 1 C.C.L.T. 331 (Alta. Dist. Ct.); and *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) 531 (H.C.J.), at 543-44, aff'd (1986), 57 O.R. (2d) 781 (C.A.).

Other examples, involving various kinds of tort, may, of course, be given. Suffice it here to repeat Williams' conclusion that, "at the present day there is no tort that is incapable of being committed jointly".[17]

More frequently, however, tortfeasors who cause the same damage are only severally liable to the injured person. For example, an infant (P) is run down in the street by a car negligently driven by D1, at a time when D2 (P's nursery school teacher) had negligently allowed P to wander out of the nursery premises. Or, P, a passenger in D1's car, is injured in an automobile collision caused by the negligence of D1 and the driver of the other vehicle, D2.

At common law, four important legal and practical consequences flow from the distinction between joint and several concurrent liability. These may be summarized as follows: (1) judgment against one joint tortfeasor bars any action against the other joint tortfeasors (the "judgment bar rule"); (2) release of, or accord with, one joint tortfeasor discharges the others (the "release bar rule"); (3) where joint tortfeasors are sued together, only one judgment can be given against them, and damages cannot be severed or apportioned (the "single judgment rule"); and (4) joint tortfeasors, but not several, concurrent tortfeasors, may be joined in a single action as co-defendants. As we shall see, all but the single judgment rule have been superseded by section 149 of the *Courts of Justice Act, 1984*.[18]

We turn first to the judgment bar rule. It should be noted that the rationale of the rule, first established in *Brinsmead v. Harrison*,[19] was *not* that P would otherwise recover twice for a single loss. The rule barred P from suing D2, even though the defendant who had been sued (D1) turned out to be insolvent and the judgment in P's favour was not satisfied. The rationale of the rule was that P had a single cause of action against joint tortfeasors, which merged in the judgment. Indeed, the judgment bar rule could prevent P from recovering anything at all. On the other hand, if D1 and D2 were only several, concurrent tortfeasors, P could proceed against D2 and recover from D2 the balance of any loss that P was unable to secure when judgment was executed against D1.

Prior to the enactment of section 149 of the *Courts of Justice Act, 1984*,[20] discussed below, the rule in *Brinsmead v. Harrison* had been modified in some respects by the former Ontario Rules of Practice.[21] Rule

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[17] Williams, *supra*, note 1, at 14.

[18] *Courts of Justice Act, 1984*, S.O. 1984, c. 11.

[19] (1872), L.R. 7 C.P. 547 (Ex.).

[20] *Supra*, note 18.

[21] R.R.O. 1980, Reg. 540.

54[22] of the Rules of Practice enabled a plaintiff to sign default judgment without prejudice to his right to proceed against any other defendant. Rule 65[23] of the Rules of Practice provided that, on any motion for judgment, judgment could be awarded against any defendant without prejudice to the plaintiff's right to proceed against another.

However, these provisions in the former Rules of Practice far from exhausted the possible effects of the rule in *Brinsmead v. Harrison*.[24] For example, it was unclear whether the Rules enabled the plaintiff to proceed against a joint tortfeasor who was not a party to the proceedings when the default judgment or motion for judgment was obtained. In addition, since Rule 54 required that the writ be specially endorsed, it would not avail the victim of a breach of contract or tort. Nor would Rule 65 assist a plaintiff suing for unliquidated damages where the plaintiff could secure a judgment only after trial.

A second consequence at common law of characterizing the liability of concurrent tortfeasors as joint, rather than merely several, was that if P settled his claim against D1 and released him, this had the effect of releasing any others who might be joint tortfeasors with D1. Even though the amount paid to P under the release was less than the damage that P had suffered, P would be unable to maintain an action for the balance against the other joint tortfeasors. The explanation for this rule that was given in the earlier cases was that the release was regarded as a "satisfaction in law", although later cases also relied upon the notion that, since the cause of action was single,

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[22] Rule 54 provided as follows:

> 54. Where the plaintiff is entitled to sign default judgment, the judgment may be signed notwithstanding that the writ may be endorsed with any other claim and any such judgment shall be without prejudice to his right to proceed against any other defendant for the same relief or against any defendant for any other relief.

This Rule did not apply when the liability of the defendants was *alternative* rather than joint and several: *Kohn v. Devon Mortgage Ltd.* (1983), 3 D.L.R. (4th) 466 (Alta. Q.B.), interpreting a similar provision in the Alberta Rules of Court (R. 148).

Section 149(1) of the *Courts of Justice Act, 1984*, *supra*, note 18 (discussed *infra*, this sec.), made former R. 54 redundant. New r. 19.08 of the Rules of Civil Procedure, O. Reg. 560/84, simply preserves the plaintiff's right to proceed against the *same* defendant for any other relief where a default judgment has been obtained against the defendant.

[23] Rule 65 provided:

> 65. On any motion for judgment, judgment may be awarded against any defendant and any such judgment shall be without prejudice to the plaintiff's right to proceed against any other defendant for the same relief or against any defendant for any other relief.

The new Rule corresponding to former R. 65—r. 20.07 of the Rules of Civil Procedure, *supra*, note 22—provides that "[a] plaintiff who obtains summary judgment may proceed against the same defendant for any other relief".

[24] *Supra*, note 19. For examples of the operation of these rules, see *Capital Carbon and Ribbon Co. Ltd. v. West End Bakery*, [1948] O.W.N. 815 (C.A.), and *G. Solway & Sons Ltd. v. Pearlman and Ezrin*, [1964] 1 O.R. 1 (H.C.J.).

when it was barred against one it was barred against all. Interestingly, however, a mere settlement of P's claim against D1, without a release, did not bar subsequent proceedings against D2.

The potential for injustice of the common law rule respecting releases could, however, be mitigated. Thus, it is clear that if the release contained an express reservation of P's rights against other joint wrongdoers, P's action against them was not barred. And if the court construed the transaction between P and D1 as a release of D1 alone, this would not release the other joint tortfeasors.[25] In either event, D2's liability to compensate P was reduced by the amount that P received from D1.

A settlement of a joint liability made in one of these ways would therefore have the same effect as either a release, with or without an express reservation of rights against others, or a covenant not to sue, made between P and one of merely several, rather than joint, tortfeasors; that is, this type of settlement would not in fact bar an action against the other concurrent wrongdoer. When a settlement was made between the injured person and one concurrent wrongdoer in a way that did not bar an action against another, the settling wrongdoer would normally seek an indemnity from the injured person against any liability to pay contribution to any concurrent wrongdoer who was held liable for the plaintiff's loss.

The common law rule that an action against the remaining joint tortfeasors was barred by a release of one was thus easily avoided in most cases where the injured person received proper legal advice. Over the years, it had become little more than a technical trap for the unwary, and was criticized by Lord Denning M.R. His Lordship concluded that the courts should abandon the rule that a release barred further action, where this was not what the parties intended and the plaintiff had not been fully satisfied.[26]

We wish to note one apparently anomalous situation concerning the distinction between joint and several concurrent tortfeasors. This concerned the effect of a plaintiff's acceptance of a payment into court made by one of many defendants to an action. In such a situation, it has been held in cases like *Reaney v. National Trust Co.*[27] that the plaintiff's action against the non-paying defendants should be dismissed, whether their concurrent

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[25] See, for example, *Dixon v. The Queen in right of British Columbia* (1979), 12 B.C.L.R. 110, 99 D.L.R. (3d) 652 (S.C.), aff'd (1980), 24 B.C.L.R. 382, 128 D.L.R. (3d) 389 (C.A.) (subsequent reference is to 99 D.L.R. (3d)).

[26] *Bryanston Finance Ltd. v. de Vries*, [1975] Q.B. 703, at 723, [1975] 2 All E.R. 609 (C.A.) (subsequent reference is to [1975] Q.B.).

[27] *Reaney v. National Trust Co.*, [1964] 1 O.R. 461, 42 D.L.R. (2d) 703 (H.C.J.). See, also, *Cassimjee v. Jarrett* (1975), 8 O.R. (2d) 726, 59 D.L.R. (3d) 174 (H.C.J.).

The reasoning in these cases has been trenchantly criticized: see Teplitsky and Gomberg, "Acceptance of Money Paid into Court by One of Several Defendants: Lawyer Beware" (1977-78), 1 Advocates' Q. 123. An English case, *Beadon v. Capital*

liability was joint or merely several. Accepting the payment was deemed to satisfy the plaintiff's claim against all the defendants to the action, even though the sum might not fully compensate the plaintiff for his recoverable loss. One possible explanation was that the terms of the payment indicated that it was intended to be in satisfaction of the plaintiff's action against the payor and all other defendants. However, since the plaintiff wished to proceed against the non-paying defendants, it must be at least doubtful whether a total satisfaction of all the plaintiff's claims was intended.

An important change to the common law respecting the judgment bar rule and the release bar rule was effected in 1984 by the *Courts of Justice Act, 1984*.[28] Section 149(1) of the Act provides as follows:[29]

> 149.—(1) Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.

Section 149(1) has the effect of abrogating the judgment bar rule and the release bar rule, both of which prejudicially affected plaintiffs who successfully sued or released one of several joint wrongdoers.[30]

In order to discourage an injured person, who may have claims against two or more persons for the same damage, from bringing unnecessary multiple proceedings, section 149(2) of the Act provides as follows:

> 149.—(2) Where a person who has suffered damage brings two or more proceedings in respect of the damage, the person is not entitled to costs in any of the proceedings, except the first proceeding in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one proceeding.

It should be noted that the "single award of costs" rule applies irrespective of whether the defendants' liability is joint or merely several.

Syndicate (Ltd.) (1912), 28 T.L.R. 394 (K.B.), aff'd 28 T.L.R. 427 (C.A.), relied upon in *Reaney*, apparently concerned the joint liability of the defendant for the tort of conspiracy. But its relevance to a case where the defendants' liability is merely several is highly dubious. Moreover, the money paid into court was the amount claimed by the plaintiff in her action; therefore, its acceptance may well have satisfied in full the plaintiffs' claims against all the defendants.

[28] *Supra*, note 18.

[29] See *Royal Bank of Canada v. Metcalfe* (1985), 3 C.P.C. (2d) 228 (Ont. Dist. Ct.).

[30] With respect to the effect of s. 149 on the payment into court rule enunciated in *Reaney v. National Trust Co.*, *supra*, note 27, see discussion *infra*, this ch., sec. 4(a).

It bears noting here that the repeal of the common law rule by s. 149 of the *Courts of Justice Act, 1984* is not restricted to joint liability in tort, but includes any case in which the plaintiff has a "single cause of action" against two or more persons. See *infra*, this ch., sec. 2(b).

A third consequence at common law of characterizing concurrent tortfeasors as joint, rather than merely several, and one that was not addressed by section 149 of the *Courts of Justice Act, 1984*, is that only a single award of damages may be made in respect of a loss or debt for which two or more defendants are jointly liable. Where, today, such defendants are pursued in separate proceedings, the plaintiff is restricted to the maximum damages awarded in the first action in which judgment was obtained. Where jointly liable defendants are sued together, only one judgment is possible and, therefore, the award of damages can only be for a single sum. Thus, if D2 is liable to pay punitive damages to P, but D1 is not, judgment must be entered for the lowest common figure for which both are liable.[31]

Since, as a result of section 149, joint tortfeasors can now be sued in successive actions, a plaintiff must calculate whether it is in his interest to commence proceedings against joint tortfeasor D1, who may be liable to pay punitive damages, but whose liability may be more difficult to establish or whose ability to satisfy a judgment against him may be dubious. On the other hand, P may conclude that, even though D2 will be liable to pay a smaller sum, his liability is easy to establish and his ability to pay beyond doubt. No such quandary faces the person who has been injured by tortfeasors who are severally liable: separate assessments can be made against different tortfeasors, and they can be sued in successive actions.

The final consequence of the distinction between the two classes of concurrent tortfeasors was that, at common law, joint tortfeasors could, but need not, be joined by the injured party as co-defendants in the same action.[32] While joint tortfeasors could be sued separately, several concurrent tortfeasors had to be sued separately, although, as we have seen, they too were liable to the plaintiff *in solidum*.[33]

The rule prohibiting joinder of several concurrent tortfeasors applied in Ontario until 1913. Under Rule 186 of the 1897 Consolidated Rules of Practice and Procedure,[34] it was held that, for concurrent tortfeasors to be

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[31] *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, at 1062-64, [1972] 1 All E.R. 801 (H.L.), and *Bryanston Finance Ltd. v. de Vries*, *supra*, note 26, at 722-23.

[32] Williams states that the common law rule respecting the joinder of several tortfeasors has gone through a "curious evolution" (*supra*, note 1, at 51). He notes that while, theoretically, the rule has always been that several tortfeasors could not be sued in the same action, there did develop a line of cases that allowed a plaintiff to succeed in his action, and to recover separate, apportioned damages against each of the several tortfeasors, if the plaintiff believed or alleged in his writ (although erroneously) that the defendants were in fact joint tortfeasors. However, the decision of the House of Lords in *Sadler v. The Great Western Railway Co.*, [1896] A.C. 450 (H.L.), reaffirmed the original rule that claims for damages against two or more defendants, in respect of their liability for separate, concurrent torts, could not be joined in one action.

[33] Williams, *supra*, note 1, at 51.

[34] See Holmested and Langton, *The Judicature Act of Ontario and the Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario* (2d ed., 1898), at 307-08.

joined, "however numerous the defendants, there must be only one claim for relief, based on one *injuria* in which all are alleged to be implicated".[35]

In 1913, the Consolidated Rules of Practice and Procedure were amended,[36] replacing former Rule 186 with Rule 67, which provided as follows:

> 67.—(1) Where the plaintiff claims that the same transaction or occurrence, or series of transactions or occurrences, give him a cause of action against one or more persons, or where he is in doubt as to the person from whom he is entitled to redress, he may join as defendants all persons against whom he claims any right to relief, whether jointly, severally, or in the alternative; and judgment may be given against one or more of the defendants according to their respective liabilities.
>
> (2) The court may order separate trials or make such other order as may be deemed expedient, if such joinder is deemed oppressive or unfair.

Rule 67 remained essentially unaltered[37] until replaced in 1984 by rule 5.02(2) of the current Rules of Civil Procedure.[38] Rule 5.02(2) provides as follows:

> 5.02(2) Two or more persons may be joined as defendants or respondents where,
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> (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
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> (b) a common question of law or fact may arise in the proceeding;
>
> (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
>
> (d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff

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[35] *Vachon v. Crown Reserve Mining Co.* (1910), 2 O.W.N. 378 (Master S.C.O.), at 379. See, also, *Hinds v. The Corp. of the Town of Barrie* (1903), 6 O.L.R. 656 (C.A.).

> It bears repeating here that, in the case of several concurrent tortfeasors, the "*damnum* is single, but each commits a separate *injuria*" (Williams, *supra*, note 1, at 16).

[36] See Holmested, *The Judicature Act of Ontario and the Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario* (4th ed., 1915), at 419. See, generally, Gale and Mintah (eds.), *Holmested and Gale on the Judicature Act of Ontario and Rules of Practice (Annotated)* (1983), at 873-82.

[37] The word "deemed" was deleted and the word "considered" substituted: see *ibid.*, at 873.

[38] *Supra*, note 22.

> or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or
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> (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

Rule 5.02(2) simplifies the language of former Rule 67 and broadens somewhat the right to join parties in a single action.[39]

The purpose of former Rule 67 and present rule 5.02(2) was and is procedural convenience:[40]

> [Rule 67] was introduced to get over the difficulties and inconveniences found in the old practice. . . . [N]ow, if the same series of transactions, etc., gives a cause of action against more than one, they can all be sued in the same action, though the causes of action be not the same.

It is not necessary that each cause of action should be identical; several wrongdoers liable for distinct damages can be joined, since "[t]he object of the rule is to avoid, if possible, the expense and delay of bringing two actions, if relief without inconvenience, expense or embarrassment can be given in one action".[41] Claims sounding in contract and in tort can be joined where they arise from the same transaction or occurrence or series of transactions or occurrences.[42]

As we have said, joinder of defendants at common law was permissive, not mandatory.[43] At common law, a plaintiff could choose to sue joint tortfeasors severally, subject to the single judgment rule, discussed above. This permissive joinder was not changed by rules 67 or 5.02(2), and a

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[39] It should also be noted here that the court appears to have an expanded power under current r. 5.03 to join persons who have not been joined by the parties. Rule 5.03(1) of the Rules of Civil Procedure, *supra*, note 22, provides that "[e]very person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding". In addition, r. 5.03(4) provides that "[t]he court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party". Conversely, under the Rules of Civil Procedure, the court retains a discretion to sever joinder of parties where joinder is "required" under R. 5 (r. 5.03(6)) or "[w]here it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party" (r. 5.05).

[40] *Campbell Flour Mills Co. Ltd. v. Bowes* (1914), 32 O.L.R. 270 (App. Div.), at 282.

[41] *Canadian Steel Corp. Ltd. v. Standard Lithographic Co. Ltd.*, [1933] O.R. 624 (C.A.), at 630.

[42] *Tellier v. Bank of Montreal* (1982), 32 C.P.C. 17 (Master S.C.O.).

[43] Williams, *supra*, note 1, at 50 and 53.

plaintiff can pursue joint or several concurrent tortfeasors severally if he chooses to do so, provided that the successive actions are not vexatious or an abuse of the court's process.[44] However, as indicated earlier, pursuing separate actions may now have significant costs consequences, as a result of section 149(2) of the *Courts of Justice Act, 1984*.[45]

In connection with the distinction between joint and several concurrent tortfeasors, now (as we have seen) rendered irrelevant in Ontario except in one particular, one further point should be made. It has been suggested that section 2 of the *Negligence Act*,[46] first enacted in 1930,[47] makes all concurrent wrongdoers joint wrongdoers. Section 2 provides as follows:

> (2) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, *where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence*, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

If section 2 does, in fact, transform several concurrent wrongdoers into joint concurrent wrongdoers, then, prior to the legislative changes described earlier, a plaintiff who released or obtained judgment against one concurrent tortfeasor would be barred from proceeding against another, even though at common law their liability was merely several, and not joint. The latter argument was made in *Reaney v. National Trust Co.*[48] and apparently rejected. In *Dodsworth v. Holt*,[49] the similarly worded Alberta statute was held not to have made all concurrent tortfeasors jointly liable, in the sense that a release of one barred the plaintiff's action against other concurrent defendants who, at common law, would have been severally liable to the plaintiff.

The argument that section 2 turns all concurrent tortfeasors into joint tortfeasors, thereby prejudicing plaintiffs injured by the acts of concurrent

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[44] *Ibid.*, at 53. See *Thomson v. Lambert*, [1938] S.C.R. 253, [1938] 2 D.L.R. 545.

[45] *Supra*, note 18. While there was no equivalent express costs sanction to discourage a multiplicity of actions under the former Rules of Practice, *supra*, note 21, such a power may have been exercised under the court's general discretion as to costs: Williams, *supra*, note 1, at 53, and *Standard Industries Ltd. v. E-F Wood Specialties Inc.* (1977), 16 O.R. (2d) 398 (H.C.J.).

[46] *Supra*, note 4.

[47] Section 2 first appeared, in slightly different form, as s. 3 of *The Negligence Act, 1930*, S.O. 1930, c. 27. This legislation created a right of contribution among concurrent wrongdoers.

[48] *Supra*, note 27.

[49] (1964), 44 D.L.R. (2d) 480, 47 W.W.R. 243 (Alta. S.C., T.D.). See, also, *Dixon v. The Queen in right of British Columbia*, *supra*, note 25, at 661.

tortfeasors who are merely severally liable, does not appear to have been accepted in any reported Ontario judgment, although it is noted by Williams as a possible, although unfortunate, effect of the wording of that section.[50] In any event, the argument has, as we have seen, been rendered largely academic by the enactment of section 149 of the *Courts of Justice Act, 1984*[51] and by the Rules of Civil Procedure,[52] especially rule 5.02(2). Its relevance is now confined to the one remaining consequence of the distinction between joint and several concurrent tortfeasors, namely, the single judgment rule.

With respect to the somewhat confusing language of section 2 of the *Negligence Act*, Williams states that the "intention [of legislation like section 2] was merely to declare that the liability of concurrent tortfeasors is *in solidum*, and no operation should be given to the legislation beyond this".[53] As noted earlier in this chapter and in chapter 1, each concurrent wrongdoer is liable *in solidum* for the whole of the plaintiff's loss, as if no other wrongdoer existed, whether the concurrent wrongdoer is jointly liable or merely severally liable. The provision in section 2 that concurrent wrongdoers are "jointly and severally liable" likely reflects the not uncommon use of that phrase, both in the past and today, to mean liability *in solidum*.

(b) Joint Contractors and Several Contractors

At common law, many of the consequences of joint liability in tort applied equally to defendants who were joint promisors. Thus, in *Kendall v. Hamilton*,[54] the House of Lords held, by analogy with the rule for joint tortfeasors, that judgment against one joint promisor barred P from suing the others. Similarly, a release of one joint promisor released the others. This latter proposition was examined in *Canadian Imperial Bank of Commerce v. Vopni*,[55] where a release effected with the knowledge and consent of the other promisors, who were sureties, was held not to bar recovery. Nonetheless, the continued vitality of the release bar rule was not doubted.

In addition, these same common law rules respecting joint liability in contract generally applied as well to what is called "joint and several" liability, an intermediate category of liability in contract between joint

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50 Williams, *supra*, note 1, at 5-6. See, also, Cheifetz, *Apportionment of Fault in Tort* (1981), at 8 and 20.

51 *Supra*, note 18.

52 *Supra*, note 22.

53 Williams, *supra*, note 1, at 6. Cheifetz also uses the "jointly and severally liable" language (*supra*, note 50, at 8).

54 (1879), 4 App. Cas. 504, 3 C.P.D. 403 (H.L.).

55 (1978), 86 D.L.R. (3d) 383, [1978] 4 W.W.R. 76 (Man. Q.B.).

liability and purely several liability.[56] Accordingly, when contractors were jointly and severally liable, the cause of action might be extinguished in the same circumstances as it would have been if they had been only jointly liable. Consequently, the release of one released the others.[57] However, the liability of trustees, which is also joint and several, was not barred by a judgment against or a release of one.[58]

It will be recalled that section 149(1) of the *Courts of Justice Act, 1984*[59] abolished the common law judgment bar and release bar rules "[w]here two or more persons are jointly liable in respect of the same cause of action". Accordingly, the repeal of the judgment bar and release bar rules is not restricted to joint liability in tort, but extends, for example, to joint debts and joint liability (as well as "joint and several" liability) for breach of contract. Moreover, the single award of costs rule in section 149(2) applies irrespective of the legal basis of the liability, so long as the plaintiff has suffered "damage".

3. REFORM AND PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

In addition to the recent reform in Ontario, various aspects of the common law relating to joint liability have attracted attention in other jurisdictions. For instance, in the United Kingdom, the *Law Reform (Married Women and Tortfeasors) Act, 1935*[60] abolished the judgment bar rule for joint tortfeasors. However, in order to discourage unnecessary litigation, where a plaintiff had sued concurrent tortfeasors (whether their liability was joint or merely several) in separate proceedings, the Act provided that costs would not be awarded to the successful plaintiff in any suit brought after he had obtained judgment against one defendant, unless there were reasonable grounds for his failure to join the defendants in one action.[61] Moreover, a plaintiff could not be awarded damages in subsequent proceedings that exceeded in aggregate the sum awarded to the plaintiff in the first action.[62]

The 1935 Act was amended by the *Civil Liability (Contribution) Act 1978*.[63] The first change effected by the 1978 legislation abolished the rule

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[56] Williams, *Joint Obligations* (1949), ch. 1, esp. at 33-41.

[57] *Ibid.*, at 135-37. However, whether judgment against one promisor bars the action against other co-promisors is less clear (*ibid.*, at 103-04).

[58] *Ibid.*, at 159-60.

[59] *Supra*, note 18.

[60] *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30, s. 6(1)(a).

[61] *Ibid.*, s. 6(1)(b).

[62] *Ibid.*

[63] *Civil Liability (Contribution) Act 1978*, c. 47.

limiting the maximum amount of damages recoverable in subsequent proceedings.[64] This was partly because the reason for its inclusion in the 1935 Act—namely, the fear that plaintiffs might be encouraged to sue defendants separately in the hope of obtaining a greater sum from another jury—had largely disappeared, presumably as a result of the virtual elimination in England of jury trials in civil litigation.

The second change made by the 1978 Act extended the abolition of the judgment bar rule by enabling P, even though he has obtained judgment against D1, to sue "any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage".[65] While, under the 1935 Act, the judgment bar rule was abolished in respect of joint liability for damages in tort, the rule is now effectively abolished for all causes of action for damages and debt.

Thirdly, the costs sanction contained in the 1935 Act was extended to all actions in respect of the same debt or damage brought successively against concurrent wrongdoers. However, costs may still be awarded where the court is of the opinion that it was not unreasonable to bring more than one action.[66]

The judgment bar rule has also been abolished in most jurisdictions in the United States, although some states limit the amount that the plaintiff may recover in subsequent litigation to the sum awarded in the first suit.[67]

The Irish *Civil Liability Act, 1961*[68] allows all concurrent wrongdoers to be sued in separate proceedings, but, like the English Act of 1935, provides that damages awarded in subsequent proceedings may not exceed the sum awarded in the first action, and that a plaintiff who had no reasonable ground for instituting more than one action is not entitled to costs in a subsequent action.[69]

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[64] Section 6(1)(b) of the *Law Reform (Married Women and Tortfeasors) Act, 1935*, *supra*, note 60, was repealed by s. 9(2) of the *Civil Liability (Contribution) Act 1978*, *supra*, note 63. See, now, s. 4 of the 1978 Act. For a similar proposal, see New Zealand, Contracts and Commercial Law Reform Committee, *Working Paper on Contribution in Civil Cases* (1983), at 21-22.

[65] *Supra*, note 63, s. 3. The Privy Council has held that the abolition extended to a situation where P sued D1 and D2 in a single action and obtained judgment first against D1: *Wah Tat Bank Ltd. v. Chan Cheng Kum*, [1975] A.C. 507, [1975] 2 All E.R. 257 (P.C.).

[66] See s. 4 of the 1978 Act, *supra*, note 63. See, also, the similar recommendations of The Law Reform Commission of Hong Kong in its *Report on the Law Relating To Contribution Between Wrongdoers*, Topic 5 (1984), paras. 9.1-9.2, at 45.

[67] See Prosser, *supra*, note 5, at 330-32.

[68] *Civil Liability Act, 1961*, No. 41.

[69] *Ibid.*, s. 18(1)(b).

The rule has also been abolished in some Canadian provinces, including Alberta[70] and Manitoba,[71] and in a number of other Commonwealth jurisdictions.[72] The *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada in 1984,[73] abolishes the judgment bar rule in respect of damages (although not debt),[74] subject to the two limitations contained in the English Act of 1935, namely, that costs may be awarded to the plaintiff only in the first action,[75] and that the plaintiff may not obtain judgment against concurrent wrongdoers for an amount that exceeds the damages awarded against another who is concurrently liable with them.[76]

By way of contrast, the release bar rule has received less legislative scrutiny. It has remained untouched by statute in the United Kingdom, although the Rules of the Supreme Court provide that in an action for defamation against defendants who are allegedly jointly liable, a plaintiff who accepts a payment into court by a defendant is not thereby barred from pursuing other joint wrongdoers, whose liability is reduced *pro tanto* by the amount so accepted.[77] However, the rule has been abolished in the Republic of Ireland by section 17 of the *Civil Liability Act, 1961*,[78] as it has been in Tasmania[79] and most jurisdictions in the United States.[80] In Canada, the Alberta Institute of Law Research and Reform has recommended that a release should not bar action against joint tortfeasors,[81] and the *Uniform Contributory Fault Act* also contains a provision abolishing the release bar rule.[82]

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[70] The *Tort-Feasors Act*, R.S.A. 1980, c. T-6, s. 3(1)(a), is similar to the English Act of 1935, *supra*, note 60.

[71] *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1970, c. T-90, s. 3(1)(a).

[72] See Fleming, *supra*, note 5, at 240, *n*. 30.

[73] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*, s. 15(b).

[74] *Ibid*., s. 15(b).

[75] *Ibid.*, s. 16(2).

[76] *Ibid*., s. 16(1).

[77] R.S.C. 1965, O. 82, r. 4. In other instances of joint liability, acceptance of a payment by one party stays proceedings against the others: R.S.C. 1965, O. 22, r. 3(4).

[78] *Supra*, note 68.

[79] *Tortfeasors and Contributory Negligence Act* 1954, No. 4 of 1954, s. 3(3). This Act may be found in Tasmanian Statutes 1826-1959 (Reprint), Vol. 6.

[80] Prosser and Keeton, *supra*, note 5, at 301-05. See, also, National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part), §6. The Act was approved by the Commissioners in 1977.

[81] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979), at 27-30, recommendation 6. See, also, The Law Reform Commission of Hong Kong, *supra*, note 66, paras. 4.8-4.9, at 17.

[82] *Supra*, note 73, s. 15(a).

4. CONCLUSIONS

(a) THE JUDGMENT BAR AND RELEASE BAR RULES AND OFFERS OF SETTLEMENT

When section 149 of the *Courts of Justice Act, 1984* was enacted, the Commission had already decided to recommend the abolition of the common law rules that prevented an injured person from suing a joint wrongdoer or debtor simply because he had already obtained judgment against, settled with, or released another who was jointly liable for the same damage or debt. We are of the view that to distinguish so sharply between joint and several liability for concurrent wrongdoers perpetuates a technical distinction from a much earlier period in legal development and can lead to injustice. The Commission had also decided that a costs sanction of the kind now contained in section 149(2) should be imposed in order to discourage the unnecessary institution of multiple litigation in respect of a single loss or debt, and that it should apply irrespective of whether the liability was joint or only several.

The Commission, therefore, welcomes the reforms that have been effected by section 149 of the *Courts of Justice Act, 1984*, although we would place the provisions dealing with joint liability, as amended in accordance with the following recommendations, in the Commission's proposed *Contribution and Comparative Fault Act*. The Commission agrees that the abolition of the judgment bar and release bar rules should apply to both joint debt and joint liability for wrongdoing, including breach of contract, and recommends that the new Act so provide.[83]

However, notwithstanding the recent statutory changes, a few points may still be appropriately made. We deal first with settlements. In this connection, we recommend that legislation should make it clear that, if a person who settles with a concurrent wrongdoer or debtor expressly gives up his right to sue *any* person who is liable for the damage or debt, he should not subsequently be able to institute a proceeding in respect of the damage or debt against a concurrent wrongdoer or debtor who was not a party to the settlement.[84]

Where P does not expressly give up his right to proceed against the non-settling concurrent wrongdoer, the law remains, in part, unclear. It will be recalled that, at common law, a mere settlement with D1, without a release, did not preclude P from proceeding against D2. However, where P settled by accepting money paid into court by D1, it was held in *Reaney v. National*

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[83] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), ss. 5(1) and 6. The Draft Act appears as an Appendix of this Report.

[84] Draft Act, s. 6.

Trust Co.[85] that P's action against the non-paying defendants should be dismissed, whether the defendants were jointly or severally liable.[86]

The effect of section 149(1) of the *Courts of Justice Act, 1984* on the payment into court rule enunciated in *Reaney* is problematic. Section 149(1) is a rather narrowly circumscribed provision and refers, among other things, to a release of a jointly liable wrongdoer. The payment into court rule encompasses a somewhat different, although related, situation; under that rule, no judgment has been obtained and no release has necessarily been provided. Moreover, the payment into court rule precludes P from pursuing any non-paying defendant, whether jointly or severally liable, whereas section 149(1), even if otherwise relevant, removes a prohibition against only joint wrongdoers, leaving severally liable co-defendants immune from suit under the rule in *Reaney*.

The Rules of Civil Procedure[87] have been significantly recast in this area, and provide for offers to settle, replacing, and to some extent integrating,[88] the former payment into court rules. They are silent on the problem considered in *Reaney*.[89]

The rule in *Reaney* is unsatisfactory in a number of respects if, and to the extent that, it prevents the plaintiff from continuing his action against the non-paying defendants, whether or not the terms of the payment expressly exclude the plaintiff's suing the other defendants to judgment, and whether or not the amount paid into court fully compensates the plaintiff for his loss. First, it may discourage the plaintiff from accepting a payment by one defendant in partial satisfaction: a plaintiff will not be able to accept a defendant's estimate of his own share of the concurrent liability of the defendants in the action if the plaintiff is thereby barred from continuing the action against other co-defendants.

Secondly, it seems anomalous to bar a plaintiff who settles a claim by accepting money paid into court by one defendant from proceeding against the other defendants, when, today, neither a judgment against, a release of, nor an out-of-court settlement with, one defendant has this effect (unless, in the latter situation, this was clearly the parties' intention).[90] Thirdly, the rule

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[85] *Supra*, note 27.

[86] See *supra*, this ch., sec. 2(a).

[87] *Supra*, note 22, R. 49.

[88] *Ibid.*, r. 49.07(3)-(4).

[89] Although, to the extent that, under R. 49, a plaintiff may settle a claim by accepting money paid into court by one joint co-defendant, and then *release* that defendant, s. 149(1) of the *Courts of Justice Act, 1984* may be invoked by the plaintiff to permit him to proceed against the other, non-paying joint defendants.

[90] A plaintiff to whom an offer to settle his own share of the liability is made by one defendant could presumably preserve his right to proceed against the other defendants

does not operate fairly, for it is likely to prejudice only the plaintiff who is unrepresented or who has not been properly advised of the consequences of accepting money paid into court by one of many co-defendants.[91]

The Commission is of the view that statutory reform is needed in this area in order to clarify the law. Accordingly, we recommend that legislation should abolish the rule in *Reaney v. National Trust Co.* and provide expressly that an offer of settlement made pursuant to Rule 49 of the Rules of Civil Procedure should be treated like any other settlement; that is, it should not prevent the injured person from pursuing his claim against others who may be concurrently liable to him in respect of the same loss, unless, of course, the offer of settlement extends to any claim that the plaintiff may have against other defendants.[92]

Another aspect of the release bar rule, aside from the payment into court anomaly considered above, concerns the release of concurrent debtors (as opposed to wrongdoers). In this connection, the Commission is of the view that section 149(1) of the *Courts of Justice Act, 1984* may cast too wide a net. We have in mind circumstances under which the release of one debtor also releases security that that debtor has provided in respect of the debt, where the release of the security would prejudice the other co-debtor by preventing the latter from resorting to it. For the sake of fairness to the latter, we recommend that a person who has released a debtor should be barred from proceeding against any other joint or joint and several debtor[93] if the release of the first debtor has prejudiced the second debtor.[94]

A third matter concerning the scope of section 149 of the *Courts of Justice Act, 1984* pertains to costs. Even though section 149(1) repeals the judgment bar rule for all causes of action in respect of which two or more persons are jointly liable, the costs sanction contained in section 149(2) seems not to deal with cases in which the plaintiff has proceeded in separate

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by proposing a settlement outside R. 49 of the Rules of Civil Procedure. The settling wrongdoer would then cease to be a defendant, and the plaintiff could proceed against the other defendants.

[91] See Teplitsky and Gomberg, *supra*, note 27.

The relevant rules in force when these decisions were made were Rr. 306, 311, and 315 of the former Rules of Practice, *supra*, note 21. The analogous English Rules of the Supreme Court have recently been held to prevent a continuation of the action against those jointly liable or those sued in the alternative: *Townsend v. Stone Toms & Partners (a firm)*, [1981] 1 W.L.R. 1153, [1981] 2 All E.R. 690 (C.A.). The acceptance of payment made by one defendant does not, however, bar the plaintiff from continuing the proceedings against other defendants severally liable for the same loss.

[92] Draft Act, s. 6.

[93] See discussion, *supra*, this ch., sec. 2(b).

[94] Draft Act, s. 6.

actions against concurrent debtors, since the latter provision applies only where the plaintiff is a person who has suffered "damage". The Commission therefore recommends that the costs sanction rule should apply to all cases of concurrent liability for which the plaintiff institutes separate proceedings.[95]

Finally, we wish to deal with the effect of the *Federal Court Act*,[96] which has added a new complication to proceedings against joint wrongdoers. The federal Crown can be sued only in the Federal Court, while servants of the federal Crown must normally be sued in a court in a province.[97] As a result, in most cases a person cannot sue the servant and the Crown in the same proceeding. If, for example, judgment is obtained first against the servant, who is unable to satisfy the judgment, proceedings against the Crown, on the basis that it is vicariously and, therefore, jointly liable, will be barred, since there is no equivalent in Federal Court proceedings to section 149(1) of the *Courts of Justice Act, 1984*.

The Commission is of the view that the law in this area is anomalous and ought to be reformed. Accordingly, we recommend that the Parliament of Canada should be requested to enact legislation that would abrogate the judgment bar and release bar rules respecting proceedings in the Federal Court.

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[95] *Ibid.*, s. 5(2). See, also, s. 24, which repeals s. 149 of the *Courts of Justice Act, 1984*.

[96] S.C. 1970-71-72, c. 1.

[97] Although s. 17(4)(b) confers concurrent jurisdiction upon the Federal Court over suits against servants of the federal Crown, if liability is not founded upon existing and applicable federal law the Court cannot constitutionally be given jurisdiction over the action: *Tomossy v. Hammond*, [1979] 2 F.C. 232 (T.D.), and *Pacific Western Airlines Ltd. and Canadian Acceptance Corp. Ltd. v. The Queen in right of Canada*, [1980] 1 F.C. 86 (C.A.). On the difficulties created by the Act and the constitutional limitations upon federal jurisdiction, see, generally, Evans, "Federal Jurisdiction—A Lamentable Situation" (1981), 59 Can. B. Rev. 124.

Recent decisions in the Trial Division of the Federal Court have attempted to expand the jurisdiction of the Federal Court in certain circumstances over the whole cause of action. It has been said that, in order to justify this assumption of jurisdiction, the facts of the case must be "so intimately intertwined...as to cry out for common trial and ultimate final resolution, [and] it would matter not if in some aspect, an issue bearing upon a party impinges upon provincial law, so long as in its pith and substance, the issue is a necessary incidence or consequence of a valid federal law and of the relative position of the parties with respect to it": *Roberts v. Canada*, [1987] 1 F.C. 155 (T.D.), at 167.

See, also, *ibid.*, at 161 and 165-66, and *Marshall v. The Queen*, [1986] 1 F.C. 437 (T.D.), at 447-48. However, on the appeal in the *Roberts* case (*sub nom. Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1987), 73 N.R. 234 (F.C.A.)), only MacGuigan J. of the Federal Court of Appeal agreed that the *Federal Court Act* conferred jurisdiction on the Federal Court over the whole cause of action, despite impingement on provincial law, where the claims in the action were "intimately intertwined".

(b) THE SINGLE JUDGMENT RULE

In one respect, the Commission believes that the *Courts of Justice Act, 1984*[98] does not go far enough in abolishing the common law distinctions between joint and merely several concurrent liability. This is in connection with the rule that only a single award of damages may be made in respect of a loss or debt for which two or more defendants are jointly liable.

A case may be made for extending the single judgment rule to all concurrent wrongdoers, that is, for recommending a reform in the law that would restrict plaintiffs who pursue concurrent wrongdoers in separate actions, whether jointly or severally liable, to the maximum damages awarded in the first action in which they obtained judgment. Such a rule would undoubtedly provide a strong incentive to institute a single action, and would prevent relitigation of the same or very similar issues. This solution has found acceptance in a number of jurisdictions, and its recent rejection in the United Kingdom may be less persuasive in Ontario, where many civil actions continue to be tried by juries that may be more prone to differ in their assessment of damages than are judges. Moreover, in Canada, the *Uniform Contributory Fault Act*[99] provides that when a judgment has determined "an amount of damages against one or more concurrent wrongdoers, the person suffering the damage is not entitled to have the damages determined in a higher amount by a judgment in the same or any other actions against any concurrent wrongdoer".

On the other hand, to impose an artificial restriction upon the maximum damages that may be awarded in the subsequent litigation may work injustice on the plaintiff by preventing his recovering from a wrongdoer the full amount of the loss for which that defendant would have been liable had the plaintiff not already obtained judgment in a previous action.[100] If the present single judgment rule were extended to all cases of concurrent liability, then a plaintiff who had obtained judgment against one defendant could not be awarded a greater sum against a severally liable wrongdoer in the following circumstances: where his injury turned out to be more serious than was apparent when he obtained judgment in the first action; where the court in the later action assessed the plaintiff's damages higher than the court in the first action had done; where the defendant in the first action had a defence that was not available to the defendant in subsequent actions (contractually limited liability, for example);[101] or where the defendant in

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[98] *Supra*, note 18.

[99] *Supra*, note 73, s. 16(1).

[100] For a criticism of the single judgment rule, see Williams, *supra*, note 1, at 63-72. Cheifetz suggests that the effect of s. 2 of the *Negligence Act*, *supra*, note 4, is that, where concurrent tortfeasors are sued in one action, a single award of damages must be made since the Act states that they are jointly and severally liable (*supra*, note 50, at 20 and 128). But see discussion *supra*, this ch., sec. 2(a).

[101] However, this rule may not apply when P obtains judgment against D1 for less than P's full loss because D1's liability is limited by statute or contract: see *Plant v. Calderwood*, [1969] N.Z.L.R. 752 (S.C.), rev'd on other grounds [1970] N.Z.L.R. 296 (C.A.).

the second action was liable to pay exemplary or punitive damages, which the defendant in the first action was not.

On balance, the Commission does not recommend that a plaintiff's right to recover his full loss should be restricted to the amount awarded in the plaintiff's first action.[102] The absence of any such ceiling from the present law in the case of several concurrent wrongdoers does not appear to occasion serious inconvenience, and the recent abolition of the judgment bar rule for joint liability is unlikely to add significantly to the number of cases in which a plaintiff will pursue his claim against concurrent wrongdoers in separate actions.

Moreover, under the present law, it remains open to a severally liable defendant to seek to establish that the plaintiff's loss was less than that found by a court in an earlier proceeding by the plaintiff against a concurrent wrongdoer. To introduce, in effect, the controversial principle of non-mutual issue estoppel in this one area of the law does not seem to be warranted by any pressing difficulty in the operation of the law as it is at present.[103] The Commission believes that the costs sanction under section 149(2) of the *Courts of Justice Act, 1984*, as expanded by our earlier recommendation, should prove a sufficient inducement to plaintiffs to join concurrent wrongdoers in a single action without imposing the further and often arbitrary penalty of limiting the amount that they can recover. The Commission therefore recommends that the present law with respect to separate awards of damages against defendants who are severally liable should be extended to those whose liability is joint. A plaintiff should always be able to prove the extent of the loss for which a particular defendant is liable, without regard to the sum awarded to the plaintiff against another, concurrently liable defendant.[104]

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[102] The importance currently attached to the plaintiff's right to choose his defendants is aptly illustrated by the refusal of the courts to allow a defendant to join as a party-defendant a person against whom the defendant claims contribution if that person was not already a party to the action and the plaintiff has not consented to that person being so joined. See, for example, *Cameron v. Murray*, [1931] O.R. 83 (H.C. Div.), and *Terminal Warehouses Ltd. v. Byam*, [1946] O.W.N. 382 (Master S.C.O.), where it was held that the plaintiff's right to choose his defendants was not overridden by a provision similar to what is now s. 6 of the *Negligence Act*, *supra*, note 4. Section 6 provides that "[w]herever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just...". See, also, Cheifetz, *supra*, note 50, at 261-64.

[103] For a recent decision on the scope of this principle, see *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). In England, the House of Lords has held that "issue estoppel" is restricted to civil actions between the same parties, although the courts' power to strike out actions as an abuse of process may in some cases address a similar issue: *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529, [1981] 3 All E.R. 727 (H.L.).

[104] Draft Act, s. 5(3).

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The provisions currently contained in section 149 of the *Courts of Justice Act, 1984*, as modified in accordance with the following recommendations, should be placed in the proposed new *Contribution and Comparative Fault Act*.

2. A person who has obtained judgment against a defendant should not thereby be precluded from instituting or continuing an action against another in respect of the same debt or damage for which the defendants are jointly liable.

3. (1) Subject to paragraphs (2) and (3), a person who releases a person should not thereby be barred from proceeding against any other person who is concurrently liable in respect of the same debt or damage.

   (2) Where a person who settles with a concurrent wrongdoer or debtor expressly gives up his right to sue *any* person who is liable for the damage or debt, he should not subsequently be able to institute a proceeding in respect of the damage or debt against a concurrent wrongdoer or debtor who was not a party to the settlement.

   (3) A person who has released a debtor should not be entitled to proceed against another who is concurrently liable in respect of the debt if the second debtor has been prejudiced by the release of the first.

   (4) The payment into court rule, enunciated in *Reaney v. National Trust Co.*, should be abolished. An offer of settlement made under Rule 49 of the Rules of Civil Procedure should be treated like any other settlement. That is, a person who accepts an offer of settlement should not be precluded from continuing or instituting an action against any other person who is or may be concurrently liable for the debt or damage in respect of which the offer of settlement was made, unless the settlement is expressly made in respect of the claim that the plaintiff may have against other persons.

4. The Parliament of Canada should be requested to enact legislation that would abrogate the judgment bar and release bar rules respecting proceedings in the Federal Court.

5. The single judgment rule should be abolished, so that the present law with respect to separate awards of damages against concurrent defendants who are severally liable would be extended to those whose liability is joint. A plaintiff should always be able to prove the extent of

the loss for which a particular defendant is liable, without regard to the sum awarded to the plaintiff against another, concurrently liable defendant.

6. A person who proceeds in separate actions against two or more persons who are concurrently liable in respect of the same damage or debt should be entitled to costs only in the first action, unless that person satisfies the court that there were reasonable grounds for bringing more than one action.

CHAPTER 3

IN SOLIDUM LIABILITY

1. INTRODUCTION

As discussed in chapter 2, wrongdoers whose acts concur to cause a single, indivisible harm[1] are each liable to the injured person for the entire amount of the damage suffered. While the injured person is not entitled to recover an amount in excess of the total damage incurred, she can obtain judgment for the full amount of damage against one or all of the wrongdoers, either in a single action or in separate, successive actions. Since each concurrent wrongdoer is liable for the entire loss, each is said to be liable *in solidum*.

In this chapter, we shall discuss the rationale for, and the criticisms of, the principle of *in solidum* liability, and consider whether any reform of the rule is warranted. As discussed below, the issue of *in solidum* liability is central to the whole area of contribution among wrongdoers, and the necessity for reform of the rule was considered by the Commission at the outset of this Project. Subsequent to the Commission's initial deliberations and recommendations with respect to *in solidum* liability, this issue gained prominence in the context of the liability insurance "crisis" in Ontario that had resulted in the appointment of the Ontario Task Force on Liability Insurance. The Final Report of the Task Force identified the principle of *in solidum* liability as a reform issue, and recommended that this Commission should give consideration to the question of its retention, modification, or abolition.[2] At the same time, it became apparent that the question of reform of the principle of *in solidum* liability had been recently addressed by a number of American jurisdictions, as one aspect of a wide variety of tort reform legislation being implemented in response to the liability insurance crisis.

While we were confident that, as a matter of principle, we had fully considered the issue of *in solidum* liability, we decided, in light of these subsequent developments, to recanvass the issue, having particular regard to recent developments in the United States. In order to do so, we requested, from every American legislature, copies of all legislation, including bills and statutes, relating to reform of the rule of *in solidum* liability, as well as copies

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[1] For discussion of the concept of "divisible" and "indivisible" damage or harm, see *supra*, ch. 2, note 5.

[2] Ontario, Ministry of Financial Institutions, *Final Report of the Ontario Task Force on Insurance* (1986) (hereinafter referred to as "Slater Report"), at 90.

of any empirical studies, reports, and legal policy analyses that had informed such reform measures. Furthermore, we commissioned a research paper from one of the leading American academics in this field, Professor George L. Priest, the John M. Olin Professor of Law and Economics, Yale Law School. Professor Priest provided a summary of the current academic analysis of the issue of *in solidum* liability, as well as a synopsis of the major American reports and studies that had considered the reform of the rule.

In March, 1987, the Commission met to reconsider the question whether the current rule of *in solidum* liability should be abolished or modified. The Commission was greatly assisted in its deliberations by the participation of a number of prominent academics in the field of tort law. These participants were Professor Priest; Professor Marc Galanter, of the School of Law, University of Wisconsin; Professors Michael J. Trebilcock, Stephen M. Waddams, and Ernest J. Weinrib, of the Faculty of Law, University of Toronto; and the Project Director, Professor John Evans. We are grateful for their invaluable advice and assistance. We feel confident that, with the benefit of their extensive experience in and knowledge of this area, the various legal, economic, and practical aspects of the operation of the rule of *in solidum* liability, as well as the issues of principle, were fully explored.

Before proceeding, a matter of terminology should be clarified. In Ontario, *in solidum* liability is more commonly referred to as "joint and several" liability.[3] However, used in this way, the latter term is a misnomer. The term more accurately refers to essentially procedural matters: as we discussed in chapter 2,[4] at common law four important legal and practical consequences flowed from the distinction between joint liability and several concurrent liability, all but one of which has now been superseded by section 149 of the *Courts of Justice Act, 1984*.[5] For the purposes of the present chapter, this facet of the law respecting joint and several liability has nothing to do with *in solidum* liability and is, therefore, irrelevant. We need repeat only that all concurrent wrongdoers, whether jointly or severally liable, are liable *in solidum*. Accordingly, we shall use the more precise, if less familiar, term "*in solidum* liability" when referring to the liability of each concurrent wrongdoer for the plaintiff's entire loss.

The principle of *in solidum* liability is clearly of great benefit to an injured person. At a minimum, the rule provides a plaintiff with control of her action; as we have said, a plaintiff can choose to sue only one or each of the wrongdoers, in a single action or in separate, successive actions. The rule also facilitates satisfaction of a plaintiff's judgment, which, if the plaintiff so chooses, may be fully satisfied by execution against only one wrongdoer, presumably the best insured or most solvent.

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[3] See, for example, *Negligence Act*, R.S.O. 1980, c. 315, s. 2.

[4] *Supra*, ch. 2, sec. 2(a).

[5] S.O. 1984, c. 11.

Prior to the development of the principles of contribution among wrongdoers, discussed in chapter 4, this procedural advantage enjoyed by an injured person was particularly controversial, since it allowed a plaintiff "to determine the incidence of loss distribution between co-tortfeasors at his own uncontrolled discretion, allowing him to throw the whole loss, if he was so minded, on one of them and completely exempt the other".[6] Now it is generally a matter of procedural convenience only, since, as we shall see below, a concurrent wrongdoer who has satisfied a plaintiff's judgment can usually recover contribution from the other wrongdoer.

However, a scheme of contribution can benefit one wrongdoer only where the other wrongdoer is available and capable of satisfying her portion of the liability. Under the current law, the most significant advantage to an injured person of the principle of *in solidum* liability is that it imposes on a concurrent wrongdoer the risk that the other wrongdoer may be insolvent or otherwise unavailable to satisfy her share of the liability to the injured person. The principle operates primarily to ensure full compensation to the injured person, to the occasional detriment of a solvent wrongdoer who is required to satisfy the entire liability, regardless of her degree of fault.

It is this latter effect of *in solidum* liability that remains controversial, giving rise to criticism of the rule and calls for its modification or abolition. A variety of arguments have been raised by those advocating change, some based on principle and others based on pragmatic or practical concerns. These include arguments regarding the relative fairness of the operation of the rule as between an injured party and a solvent wrongdoer, the impact of the rule on the cost and availability of liability insurance and on the goals of deterrence and risk management, and the potential ramifications for the tort system generally of change to the existing rule. Each of these arguments will be canvassed briefly in this chapter.

Before considering the debate about the retention, abolition or modification of the principle of *in solidum* liability, an important, although perhaps obvious, point should be re-emphasized. It is the rule of *in solidum* liability that makes necessary the principle of contribution among wrongdoers; if every wrongdoer, concurrent or otherwise, were liable only for that portion of the damages equal to her degree of fault, there would be no need for a scheme of recovery—that is, contribution—from other wrongdoers. Accordingly, the question whether *in solidum* liability should be retained is, in effect, the starting point of this Report.

2. THE DEBATE REGARDING *IN SOLIDUM* LIABILITY

(a) The "Fairness" Argument

The central rationale offered for the principle of *in solidum* liability is that, since the conduct of each concurrent wrongdoer was a cause of the indivisible damage suffered by the injured person, it is fundamentally just

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[6] Fleming, *The Law of Torts* (6th ed., 1983), at 232-33.

that each should be fully liable to the injured person for the consequences. The fact that the conduct of another wrongdoer may have also contributed to the same injury should not prejudice the right of the injured person to obtain full compensation for the damage; rather, it should merely be a matter for resolution as between concurrent wrongdoers themselves. Proponents of this view acknowledge that there may be some unfairness where a solvent wrongdoer is required to satisfy the entire liability without contribution from the other concurrent wrongdoer. However, they emphasize that the unfairness would be much greater if an injured person were undercompensated for the single indivisible harm caused by the fault of that same wrongdoer.[7]

Opponents of *in solidum* liability disagree that this concern with providing full compensation to an injured person should override considerations of fairness to defendants. In their view, a plaintiff should have no greater claim to the sympathy of the court than a defendant. They observe that, where there is only one defendant, a plaintiff must bear the risk that she may be insolvent, and they ask why a plaintiff should be in a better position merely because the damage suffered was caused by more than one person.[8]

Moreover, critics of *in solidum* liability point out that circumstances have changed since the rule was developed. The principle was originally of benefit only to a completely innocent plaintiff; at common law, a person who had contributed to her own injury, even to a minor degree, was completely barred from recovering against any other person whose fault was also a cause of the injury. However, the abolition of the rule of contributory negligence[9] allowed a plaintiff who was also at fault to recover from other wrongdoers, even though such wrongdoers remained liable *in solidum*. This modification of the common law has given rise to circumstances in which

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[7] For an excellent discussion of the rationale for *in solidum* liability, see the decision of the California Supreme Court in *American Motorcycle Association v. The Superior Court of the State of California for the County of Los Angeles*, 20 Cal. 3d 578, 578 P. 2d 899 (Sup. Ct. 1978) (subsequent references are to 20 Cal. 3d). See, generally, Adler, "Allocation of Responsibility After *American Motorcycle Association v. Superior Court*" (1978), 6 Pepperdine L. Rev. 603; Fleming, "Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with *American Motorcycle Association v. Superior Court*" (1979), 30 Hastings L.J. 1465; Pearson, "Apportionment of Losses under Comparative Fault Laws—An Analysis of the Alternatives" (1980), 40 La. L. Rev. 343; and Bachrach, "Damage Apportionment in Maine: A Proposal for Reform" (1982), 34 Maine L. Rev. 367.

[8] These arguments were made in the following American cases that abolished *in solidum* liability: *Laubach v. Morgan*, 588 P. 2d 1071 (Okla. Sup. Ct. 1978); *Brown v. Keill*, 224 Kan. 195, 580 P. 2d 867 (Sup. Ct. 1978) (subsequent references are to 224 Kan.); and *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P. 2d 579 (Ct. App. 1982) (subsequent references are to 646 P. 2d). See, further, *infra*, this ch., sec. 3(b).

[9] The contributory negligence rule was abolished in Ontario in 1930 and replaced by a scheme of comparative fault. Under this scheme, the plaintiff may recover damages, but the award is reduced by an amount proportional to the plaintiff's degree of fault: *The Negligence Act, 1930*, S.O. 1930, c. 27, s. 5, now *Negligence Act*, *supra*, note 3, s. 4.

the operation of the rule of *in solidum* liability is most severely criticized for unfairness to defendants, that is, where a plaintiff's degree of fault is equal to, or exceeds, that of the solvent wrongdoer. Take, for example, a case where the respective degrees of fault of P, D1, and D2 are 25, 60, and 15 percent, respectively. By operation of the rule of *in solidum* liability, where D1 is insolvent, D2, whose degree of fault was 15 percent, would be liable for 75 percent of the entire damage, although P's degree of fault was almost twice that of D2.

Opponents of *in solidum* liability assert that the retention of the rule is inconsistent with the principle underlying comparative fault,[10] which, they argue, contemplates each party being liable only in proportion to her respective degree of fault. In their view, the introduction of a regime of comparative fault essentially realigned the equities between plaintiffs and defendants and, accordingly, should have involved a change of the rule of *in solidum* liability.[11] The contention is that the abolition of *in solidum* liability, to the benefit of defendants generally, should have been the *quid pro quo* for the abolition of the contributory negligence rule, which expanded the scope of recovery for all plaintiffs.[12]

The response to these arguments of those who favour *in solidum* liability is twofold. First, it is said that the abolition of the rule would prejudice not only the negligent, but also the completely innocent, plaintiff; it would be anomalous if reform of the doctrine of contributory negligence were achieved at the expense of the rights of a plaintiff who was completely without fault.[13] Secondly, it is argued that the nature of the fault attributed to an injured person differs qualitatively from that of defendants; a plaintiff's fault merely constitutes failure to take care of herself, while the defendants' fault lies in failure to take care to avoid danger to others.[14] Moreover, the percentage attributed to the plaintiff's failure to take care is sometimes a conventional figure,[15] which is applied automatically, even where defendants are grossly negligent; such a figure may bear little relationship to the actual relative fault of the plaintiff. Proponents of *in solidum* liability say that a reduction of the plaintiff's claim in proportion to her degree of fault is a sufficient penalty to reflect the plaintiff's lack of care, and that abolition of *in solidum* liability is unwarranted.

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[10] *Laubach v. Morgan*, *supra*, note 8, at 1074.

[11] *Brown v. Keill*, *supra*, note 8, at 203.

[12] *Bartlett v. New Mexico Welding Supply, Inc.*, *supra*, note 8, at 582.

[13] *American Motorcycle Association v. The Superior Court of the State of California for the County of Los Angeles*, *supra*, note 7, at 589-90.

[14] *Ibid.*

[15] For instance, in Ontario, between 10% and 30% is generally deducted from an award for failure to wear a seat belt. Some have suggested that the degree of contributory negligence in such cases is determined arbitrarily. See *infra*, ch. 10, sec. 1(b).

(b) THE INSURANCE ARGUMENT

The issue of *in solidum* liability has arisen most recently for debate in the context of dramatic changes in the liability insurance market in the past few years. These changes, characterized by some as an insurance "crisis", have resulted in sharply increased costs, and shrinking availability, of liability insurance to the public, particularly to businesses and public entities. As a result, beneficial goods and services have become more costly and less widely available, as those who provide such goods and services are required either to pass on the higher premium costs, or to withdraw goods and services for which the cost of insurance has become prohibitive.

While the cause or causes of this insurance "crisis" have been the subject of heated debate, it is alleged by some, particularly public and private corporations and their insurers, that the operation of the principle of *in solidum* liability is a key contributing factor to these recent developments.[16] Critics of *in solidum* liability say that the rule has its most significant impact on what have become commonly known as "deep pocket" defendants, that is, defendants or potential defendants who are the most solvent or best insured. It is said that, because such defendants are the most likely source of full recovery by an injured person, they are often joined in an action even if they are only marginally liable, or not liable at all. It has been suggested that sympathetic finders of fact may attribute small degrees of fault to innocent deep pocket defendants in order to ensure compensation to a victim who might not otherwise recover.[17] Moreover, it is argued that the prospect of being found liable to pay the entire award of compensation to the plaintiff, even where the percentage of fault attributable to the deep pocket defendant is very small, or non-existent, places intense pressure on such defendants to settle for amounts well in excess of the amount proportional to their actual share of fault—payments that must be reflected ultimately in higher insurance premiums.

In addition, opponents of *in solidum* liability suggest that the impact of the rule on premiums is not simply a reflection of increases in actual payouts, either by way of settlement or judgment. They say that the uncertainty created by the rule also leads to increased premiums. Critics of the rule argue that *in solidum* liability, in effect, requires deep pocket defendants to insure not only against their own negligence but also against

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[16] See, generally, Slater Report, *supra*, note 2, at 53-55; Insurance Brokers Association of Ontario and Toronto Insurance Conference, "Response to Slater Task Force" (1986), at 4; Lilly, "Professional Liability Insurance" (1986), Appendix 10 to the Slater Report, at 19-20; Florida, Senate Committee on Commerce, *A Review of Historical Analysis—Current Perspectives of the Doctrine of Joint and Several Liability* (1986) (hereinafter referred to as "Florida Report"), at 36-46; United States, Justice Department, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (1986); and New York, *Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance* (1986) (hereinafter referred to as "New York Report"), at 129-32.

[17] Slater Report, *supra*, note 2, at 62.

the possible insolvency of a concurrent wrongdoer. The risk of insolvency of an unknown co-defendant is one that is said to be extremely difficult to predict or insure against. In calculating an insurance premium, an insurer must make a prediction of not only the likely average judgment or claim over a specified period, but also the range of potential outcomes. As the range of outcomes increases or decreases, so premiums increase or decrease. It is said that, because the operation of *in solidum* liability makes these predictions more difficult, an additional, sometimes substantial, risk premium must be added to the cost of liability insurance.

Critics of *in solidum* liability contend that imposing the risk of potential insolvency of a concurrent wrongdoer on defendants is inefficient, and that it is unfair that the costs of such inefficiency should be borne by society generally in the form of higher costs and diminished availability of goods and services. They suggest that, from an economic perspective, it would be more efficient for a plaintiff to absorb that risk, for which she could insure on a first party basis.

Proponents of *in solidum* liability are skeptical regarding these claims by deep pocket defendants and their insurers about the impact of the rule on insurance premiums. They acknowledge that the *in solidum* rule creates some risk that marginally liable defendants will be held liable for the entire loss, and thereby encourages settlement. However, they assert that such defendants cannot seriously be considered to be "held for ransom" since, in most cases where a defendant is marginally liable, there is an equally strong incentive for the plaintiff to settle for a reasonable amount, roughly commensurate with the likely degree of fault, or face the risk that no liability will be attributed to that defendant at trial. On this argument, the impact of *in solidum* liability cannot be significant, because an insurer need establish premiums based on liability for the full award of damages only in respect of the very small percentage of cases that are actually litigated.

Advocates of *in solidum* liability also dispute the occasional allegations of intellectual dishonesty attributed to triers of fact. It has been denied that there is any evidence that judges or juries in Ontario, or indeed elsewhere, are finding liability where none exists, in order to compensate victims.[18] Moreover, it is argued that, even if judges or juries were disposed to ascribe liability where none existed, the appropriate response should be to control such conduct, and not to abolish a just and valid legal principle.

Those who favour retaining *in solidum* liability emphasize that there is little evidence that the rule is an element, let alone a major cause, of the insurance crisis. Such evidence as exists is, in fact, largely anecdotal. It appears that there have been no empirical studies done in Canada with

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[18] Canadian Bar Association-Ontario, *Submission to the Minister of Financial Institutions in Response to the Ontario Task Force on Insurance* (July, 1986), at 28-29, and The Committee for Fair Action in Insurance Reforms, *A Report in Response to the Ontario Task Force on Insurance* (1986), at 13-14.

respect to the impact of the rule. In the United States, where there has been a flurry of legislative reforms of the principle of *in solidum* liability,[19] only two studies appear to have produced any empirical data relating to the operation of the rule, and their findings are general and inconclusive.[20] The data that might provide reliable empirical evidence of the impact of the rule, such as the magnitude of the incidence of insolvency, is in the hands of the insurers. It has been suggested that the failure of the insurance industry to provide such "hard" evidence renders the claims suspect.[21]

While arguments can be marshalled on either side of the insurance issue, it is apparent to us that, without further empirical evidence, conclusions respecting this aspect of the debate regarding *in solidum* liability will remain speculative, and, therefore, provide an unsatisfactory basis on which to amend, much less abolish, the present rule.

(c) Deterrence

The arguments regarding issues of fairness and insurance canvassed thus far are concerned with one of the central aims of the tort system, which is compensation of the injured party. This section considers arguments about *in solidum* liability in relation to another widely acknowledged purpose of the tort system, namely, deterrence of activity that may cause harm to others.[22] Simply stated, our system of tort liability requires people to take responsibility for their actions, that is, to be safety conscious. It is expected that people who know that they will be held accountable for their actions will take precautions in order to avoid liability, and that optimal precautions will be taken where the cost of prevention is less than the cost of potential liability. The greater the potential liability, the greater the resources that will be allocated to accident prevention.

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[19] See *infra*, this ch., sec. 3(c).

[20] The first is a study made for the State of New York, which estimated that 9% of annual claims payouts of the City of New York were attributable to the operation of the doctrine of joint and several liability: New York Report, *supra*, note 16, at 131. The Report gives no details of how the study arrived at this figure.

The second study was prepared for the Florida Senate Committee on Commerce in December, 1985: Dimento, Harrison and Belsky, "Joint and Several Liability: A Study of the Fiscal and Social Impact of Change in the Doctrine" (University of Florida, College of Law, mimeograph, December, 1985). Comparing information and data from five states that had abolished the doctrine, five states that had limited the doctrine, and seven states in which the doctrine operated, the authors tentatively concluded that insurance coverage and rates appeared to be increasing in all the jurisdictions studied. Moreover, they found that a greater percentage of respondents from states that had abolished the doctrine reported insurance increases than those that had modified or retained the doctrine. However, in a recent conversation with a representative of the Commission, one of the authors of the study cautioned against placing much reliance on the findings of the study. The study also contained broad disclaimers of its reliability.

[21] Florida Report, *supra*, note 16, at 51 and 61.

[22] For a legal-economic analysis of the tort system and accident prevention, see Posner, "A Theory of Negligence" (1972), 1 J. Legal Stud. 29.

As with the insurance issue, there is disagreement regarding the impact that abolition of *in solidum* liability would have on the goal of deterrence. It has been argued that abolition probably would not affect the risk management behaviour of potential defendants.[23] The argument is that any potential party to an accident will take optimal precautions to prevent an accident, if that party expects that it might bear the entire cost of the accident. According to this argument, because no person could know, in advance, that the negligent conduct of another might also be a cause of the same damage, a person will always have the necessary incentive to take optimal precautions to avoid the risk of accident.

However, advocates of *in solidum* liability assert that exposing concurrent wrongdoers to potential liability for the entire award of damages motivates potential defendants, particularly deep pocket defendants, to implement safety measures that otherwise might be considered uneconomical.[24] They suggest that decreasing such potential liability by abolishing the *in solidum* rule would necessarily reduce the incentive for effective accident prevention. For example, assume that a highway authority negligently fails to clear a spill on the highway caused by another, unidentified person. Under the present *in solidum* rule, the highway authority could be liable for 100 percent of the damage caused by its failure to clean the spill. If the rule were abolished, the highway authority might be held liable for only a small percentage. Advocates of *in solidum* liability say that, if the rule were abolished, the highway authority would clearly have diminished incentive to allocate resources to ensure the safety of highways.

Unfortunately, as with the insurance issue, we are without reliable data and persuasive empirical evidence. Accordingly, the aspect of the debate that focuses on the effect of *in solidum* liability on deterrence also will remain theoretical and speculative.

(d) Other Ramifications for the Tort System

Competing arguments have also been made regarding the effect that a change to the doctrine of *in solidum* liability would have on the operation of the tort system as a whole, including such aspects of that system as settlement behaviour, litigation strategy, defence costs, and the administration of the courts.[25] For example, it has been suggested that, because defendants'

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[23] Rea, "The Economics of Comparative Negligence" (University of Toronto, unpublished mimeograph, April 10, 1986). See, also, Easterbrook, Landes and Posner, "Contribution Among Antitrust Defendants: A Legal and Economic Analysis" (1980), 23. J.L. & Econ. 331, and Polinsky and Shavell, "Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis" (1981), 33 Stan. L. Rev. 447, in which this analysis has been applied in the context of contribution.

[24] Dimento, Harrison and Belsky, *supra.*, note 20, at 30-33.

[25] See, generally, Dimento, Harrison and Belsky, *ibid.*, at 24-28, and Florida Report, *supra*, note 16, at 56-61.

liability would be lower and more easily predicted if the doctrine were abolished, it is possible that more settlements would be reached.[26]

Others have argued that abolition of *in solidum* liability could result in fewer settlements, with resulting increased costs of litigation to the parties and a further burden on the already overtaxed resources of the civil justice system. The fact that the potential liability of each defendant would be lower and more predictable is seen as reducing significantly the defendant's risk at trial, thereby reducing her incentive to settle.[27] Similarly, it is argued, a plaintiff would be less inclined to settle because of uncertainty with respect to the degree of liability of a settling defendant, and concern that the remaining defendants would successfully argue that the absent, settling defendant was primarily at fault.[28] Advocates of *in solidum* liability also caution that abolition of the rule would result in longer and more complicated trials, and increased defence costs, as plaintiffs would feel compelled to join every possible defendant in order to ensure full recovery.[29]

Once again, these arguments are speculative. While abolition or modification of the principle of *in solidum* liability would undoubtedly have ramifications for the operation of the tort system as a whole, without further study it is not possible to predict whether the overall impact would be beneficial, or to whom.

3. THE LAW IN THE UNITED STATES

(a) INTRODUCTION

In the United States, *in solidum* liability, uniformly called "joint and several liability", applies to what are referred to as "joint torts" and "joint tortfeasors". Although American principles governing joint and several concurrent wrongdoers developed from the English common law principles described in chapter 2, it has been noted that the American concept of joint torts and joint tortfeasors, through "loose usage", have become uncertain and confused.[30] It appears that the term "joint tortfeasor" includes not only persons acting in concert, but also independent, concurrent wrongdoers.[31] Further, the term has been defined to mean two or more persons joined in the same action.[32] This latter definition appears to have given rise to the

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[26] See the discussion in the Florida Report, *ibid.*, at 60.

[27] Dimento, Harrison and Belsky, *supra*, note 20, at 24-27.

[28] *Ibid.*, at 27.

[29] Florida Report, *supra*, note 16, at 56-59.

[30] Dobbs, Keeton, and Owen (eds.), *Prosser and Keeton on the Law of Torts* (5th ed., 1984) (hereinafter referred to as "Prosser and Keeton"), at 322.

[31] *Ibid.*, at 323.

[32] *Ibid.*, at 324.

unfortunate possibility that independent, non-concurrent wrongdoers, liable for different, distinct damages, but joined for procedural convenience in the same action, may be held "jointly and severally" liable for the entire amount of damages awarded in the action, a clearly unwarranted extension of the doctrine.[33]

(b) Reform in the Context of Comparative Fault

The question whether the principle of *in solidum* liability should be abolished or retained in the United States was first debated in the context of the widespread abolition of the doctrine of contributory negligence and the implementation of a scheme of comparative fault by the majority of states.[34] Most American lawmakers agreed that the contributory negligence rule, under which contributory negligence operates as a complete bar to recovery, often worked hardship, particularly with respect to a plaintiff whose fault was slight. However, many jurisdictions believed that it was unfair that a plaintiff whose fault was equal to, or exceeded, that of a particular defendant should recover damages for the loss incurred. As a result, two types of comparative fault system developed.[35] Under the first type, "pure" comparative negligence, a plaintiff's recovery is reduced, but not eliminated, by her share of fault. For example, a plaintiff who is 99 percent at fault nevertheless may recover 1 percent of her loss from a defendant. The second type, "modified" comparative fault, takes one of two general forms: a plaintiff is barred from recovery where her fault is (1) equal to, or (2) greater than, that of one or more of the defendants.

Certain states in which a scheme of comparative fault was implemented failed to address expressly the question whether the doctrine of *in solidum* liability continued to apply in the context of comparative fault, and, accordingly, the issue arose for judicial determination. A number of state courts decided that the doctrine was no longer appropriate under a regime of comparative fault.[36] In abolishing the doctrine, these courts relied on

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[33] *Ibid.*, at 329. This extension of the doctrine was raised as part of the discussion of the need for reform in an unpublished memorandum by Stephen Saltzman to the American Trial Lawyers Task Force on Litigation Issues (June 8, 1986), at 190. Prosser and Keeton, *supra*, note 30, at 329, indicate that this tendency to confuse liability for the entire damages with joinder of parties has resulted in a reluctance on the part of American courts to allow joinder in cases where clearly it would be procedurally convenient to do so, in order to avoid imposition of *in solidum* liability on defendants otherwise liable for different damages.

[34] In some jurisdictions, such as California, the reform was implemented by the courts: see *Li v. Yellow Cab. Co. of California*, 119 Cal. Rptr. 858, 532 P. 2d 1226 (Sup. Ct. 1975). However, in most states, the reform was by legislation. See, generally, Schwartz, *Comparative Negligence* (2d ed., 1986), at 11-28.

[35] See, generally, Woods, *Comparative Fault* (2d ed., 1983), and Schwartz, *supra*, note 34.

[36] See, for example, *Laubach v. Morgan*, *supra*, note 8; *Brown v. Keill*, *supra*, note 8; and *Bartlett v. New Mexico Welding Supply, Inc.*, *supra*, note 8.

various arguments, discussed above,[37] to the effect that the principle of comparative fault called for a realignment of the equities between plaintiffs and defendants. Perhaps most significantly, these courts rejected the notion that a plaintiff has any greater claim upon the sympathy of the court than defendants, or that concern with compensation of victims should override concerns of fairness to defendants.[38]

However, in a leading case a contrary view was expressed and the doctrine of *in solidum* liability was upheld, primarily on the ground of a "pragmatic policy determination" that "from a realistic standpoint...[the] suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries".[39]

Ultimately, the doctrine was retained in most American states. Nevertheless, it was apparent that both abolition and retention of the doctrine of *in solidum* liability could give rise to some unfairness to either plaintiffs or defendants. Many commentators argued that, while assurance of full compensation for an innocent victim might well outweigh claims of fairness of a solvent defendant whose conduct was a cause of the loss, the force of a plaintiff's claim is diminished where she was also a cause of the loss, and particularly if the degree of fault of the plaintiff exceeded that of the defendant against whom the entire judgment would be satisfied.[40] These commentators advocated a third alternative, a form of "risk-sharing", which in their view was more consistent with the policy underlying comparative fault than either outright abolition or retention of full wrongdoer liability.

This reallocation alternative provides for sharing of the liability of an insolvent or absent defendant by all remaining parties, including the plaintiff, in proportion to their respective degrees of fault. For example, if the proportional fault of P, D1, and D2 was 25, 50, and 25 percent, respectively, and D2 was insolvent, P's share of fault would be increased by one-third and D1's share by two-thirds. If D1 was insolvent, the share of P and D2 would increase equally. Such a reallocation scheme was adopted in section 2(d) of the Uniform Comparative Fault Act,[41] the Comment to which explains that the reallocation "avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility

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[37] *Supra*, this ch., sec. 2(a).

[38] *Laubach v. Morgan*, *supra*, note 8; *Brown v. Keill*, *supra*, note 8; and *Bartlett v. New Mexico Welding Supply, Inc.*, *supra*, note 8.

[39] *American Motorcycle Association v. The Superior Court of the State of California for the County of Los Angeles*, *supra*, note 7, at 589-90.

[40] Fleming, *supra*, note 7, at 1492; Bachrach, *supra*, note 7, at 396; and Pearson, *supra*, note 7, at 364-65. Fleming indicates that the originator of this alternative was Gregory: see *Legislative Loss Distribution in Negligence Actions* (1936), at 77-79.

[41] National Conference of Commissioners on Uniform State Laws, Uniform Comparative

upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant".[42]

(c) An Assessment of Recent Reforms in the United States

As in Ontario, more recent calls in the United States for the abolition or modification of the doctrine of *in solidum* liability have been founded almost invariably on the operation of the doctrine on "deep pocket" defendants and the consequential effects on the public. The Preamble to recent legislation in California that modified the doctrine articulates the central concerns underlying such reform:[43]

> The People of the State of California find and declare as follows:
>
> (a) The legal doctrine of joint and several liability, also known as 'the deep pocket rule', has resulted in a system of inequity and injustice that *has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers*.
>
> (b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. *The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums*.
>
> (c) *Local governments have been forced to curtail some essential police, fire and other protections* because of the soaring costs of lawsuits and insurance premiums.
>
> Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part). Section 2(d) provides as follows:

> (d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

[42] *Ibid.*, 1987 Pocket Part, at 43.

[43] Cal. Civ. Code, §1431.1 (West Supp. 1988).

> The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

It seems apparent from this Preamble that the "inequity and injustice" that this legislation is intended to address is the consequential impact of the operation of the doctrine on the cost and availability of socially beneficial goods and services to the public; it is less concerned with the relative equities between plaintiffs and defendants. The legislation is premised on the assumption that the rule of *in solidum* liability has been a major contributing factor to the recent increases in the cost, and diminished availability, of liability insurance. However, as we have discussed,[44] this assumption, which seems to be widely held in the United States, is based largely on anecdotal evidence; it appears that no satisfactory studies have been conducted to estimate the economic or social impact of the doctrine.

Most American states that have enacted or proposed reform measures provide for the modification, rather than outright abolition, of the doctrine of *in solidum* liability. These reform measures are of four general kinds.

The first type of reform abolishes *in solidum* liability with respect to non-economic losses, that is, losses attributable to such matters as pain and suffering.[45] This kind of measure would continue to ensure full compensation to the plaintiff for actual out-of-pocket expenses, including loss of future income and costs of future care. Such a measure would presumably be of greater significance in the United States, where very large awards for non-economic losses have been made, than in Ontario, where there is an upper limit on the amount of damages that may be awarded for non-economic loss.[46]

The second type of reform abolishes or modifies the doctrine with respect to several types of defendant who might be particularly vulnerable as "deep pockets", such as public bodies or certain professionals.[47] This kind of measure is probably intended to encourage the continued provision of social

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[44] *Supra*, this ch., sec. 2(b).

[45] See, for example, the California legislation, *supra*, note 43.

[46] In 1978, the Supreme Court of Canada established a "rough upper limit" of $100,000 for an award of damage for non-economic loss. Allowing for inflation, the current limit is approximately $190,000. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; and *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609. In ch. 3 of the Commission's recent *Report on Compensation for Personal Injuries and Death* (1987), the Commission has recommended retention of the present law represented by these cases.

[47] In West Virginia, the legislation modifies joint and several liability in medical malpractice suits: W. Va. Code, §55-7B-9 (1986 Supp.). In New Jersey, the legislation abolishes the rule with respect to public employees and public entities: S.B. 375 (1986).

services, such as playgrounds, daycare centres, or medical services, that might otherwise be withdrawn because of the high cost of liability insurance. The policy choice here would appear to be between the occasional hardship to a plaintiff, even a totally innocent plaintiff, and the denial of socially beneficial services. Of course, the efficacy of such measures depends on whether deep pocket defendants are being unduly affected, a question which, as we have seen, is debated by proponents of *in solidum* liability.

A third type of reform measure would retain *in solidum* liability with respect to an innocent plaintiff, but would abolish or modify the doctrine where the plaintiff's fault exceeds a specified degree—for example, 50 percent—or is greater than the fault of each defendant.[48] This type of reform proposal is concerned with the relative degrees of fault between the plaintiff and defendant, and appears to reflect the concerns of fairness as between a defendant and a negligent plaintiff that animated the "modified" comparative fault schemes.

A fourth type of measure focuses on the degree of fault of the defendant and abolishes the doctrine where the degree of fault is small, for example, less than 25 percent.[49] Such a measure would reduce the impact of the rule on deep pocket defendants who are marginally at fault.

The criticism of the third and fourth types of reform measure is that they may operate arbitrarily and perhaps illogically. For example, where *in solidum* liability would be abolished if the plaintiff's fault is greater than 50 percent, a plaintiff who is 49 percent at fault would recover fully, while a plaintiff who is 51 percent at fault would not. To quote the Prefatory Note on the concept of "modified" comparative fault in the American Uniform Comparative Fault Act, "a difference of a single point in the percentage of fault allocated to the claimant may determine whether he can recover [in full]. It is unrealistic to expect a [fact finder] to reach a decision this precise...".[50]

Finally, a fifth type of reform measure[51] involves a reallocation scheme of the kind provided for by the American Uniform Comparative Fault Act, the rationale for which has been discussed above.[52]

Reallocation schemes are subject to criticisms similar to some of those directed at abolition of *in solidum* liability. "Risk-sharing" between the

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[48] Fla. Tort Reform and Insurance Act of 1986, 1986, §768.81(3), and La. Civ. Code, art. 2324.

[49] Ill. Rev. Stat., ch. 110, §§2-1117 and 2-1118 (Smith-Hurd Supp. 1987).

[50] *Supra*, note 41, 1987 Pocket Part, at 38.

[51] In Michigan, the legislation abolishes joint and several liability where a plaintiff has been contributorily negligent, but provides for reallocation if the plaintiff is unable to recover from any one defendant: Mich. P.A. 178, 1986, §6304(6).

[52] *Supra*, this ch., sec. 3(b).

injured person and wrongdoer is said to be inappropriate because the nature of the injured person's negligence differs from that of the wrongdoer: the conduct of the injured person has endangered herself only, while the wrongdoer's conduct has jeopardized the safety of others. Furthermore, it is unclear what effect a scheme of reallocation would have on the operation of the tort system as a whole, including such matters as settlement and litigation behaviour.

4. CONCLUSIONS

Any proposal for reform of the principle of *in solidum* liability raises a fundamental question: who should bear the risk of the insolvency or absence of a concurrent wrongdoer, the injured person or the other wrongdoer? As we have discussed, the principle of *in solidum* liability helps to assure the goal of full compensation to an injured person for losses attributable to the fault of others, a goal that the Commission regards as fundamentally just. Abolition of the rule would mean that some injured persons, including those who are completely innocent, would remain undercompensated for their losses. In our view, the burden of justifying change clearly lies with those who propose reforms that would give rise to such a result.

We have not been persuaded that there is a sufficiently strong economic argument to support the abolition or modification of *in solidum* liability. From our review of the current debate in the context of the insurance "crisis", it seems apparent that, at this time, there exists no persuasive empirical evidence to support the contention that the principle of *in solidum* liability constitutes a significant contributing factor in respect of the escalating costs and diminished availability of liability insurance. It may be that reliable data is available, from the insurance industry or elsewhere, from which conclusions could be drawn concerning the dimensions of the alleged dysfunctional impact of the rule. However, without such hard evidence, economic arguments relating to insurance remain necessarily theoretical and speculative. Moreover, while competing arguments have been raised regarding the impact of the principle of *in solidum* liability on the goal of deterrence, and on the operation of the tort system as a whole, we have no sound basis upon which to anticipate the overall effect that abolition or modification of the rule would have on these aspects of the existing regime of tort compensation.

As we have discussed,[53] arguments have also been made, in principle, for the abolition or modification of the principle of *in solidum* liability on the grounds of fairness to defendants. However, we have come to the conclusion that these arguments, like those discussed above, do not weigh sufficiently in favour of any change to the existing rule.

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[53] *Supra*, this ch., sec. 2(a).

With respect to an innocent plaintiff, the Commission believes that there is no reason, in principle, to deny full compensation to a person who has been injured through the fault of another person, and through no fault of her own. We share the view, often expressed, that whatever unfairness the operation of the principle of *in solidum* liability might create for a concurrent wrongdoer who is required to satisfy more than her share of liability, the inequity would be much greater if a completely innocent victim were to be undercompensated.

We recognize that the operation of the principle of *in solidum* liability raises more concern where the plaintiff has contributed to her own loss and where one of the wrongdoers is either insolvent or absent. Arguably, as the plaintiff's degree of fault increases, the force of claims concerning the unfairness of incomplete compensation diminishes, particularly where the degree of fault of the plaintiff exceeds that of the defendant against whom the entire judgment would be satisfied. It has been suggested that the rule of *in solidum* liability should be modified to require an injured person and the remaining solvent wrongdoer to share the risk of the insolvency or absence of the other wrongdoer.[54] Our response to this proposal is twofold.

First, we share the view that in many, although not all, instances, the fault of the injured person and that of the wrongdoer differ in quality and not just in degree; the negligence of a passenger in failing to wear a seatbelt differs from that of the careless driver whose conduct caused the accident. In such a case, the reduction of the plaintiff's claim in an amount proportional to her contributory negligence may fairly be regarded as a sufficient penalty.

The second response is based on practical considerations. Although the Commission recognizes some merit in the argument in favour of risk sharing, we are concerned that a scheme for proportional reallocation of an insolvent or absent wrongdoer's share of liability could create new uncertainty and potential unfairness. We do not know, for example, what effect the possibility of reallocation would have on settlement behaviour and litigation strategy. The degree of fault of the insolvent or absent wrongdoer could become a new issue to be litigated, as the solvent wrongdoer attempts to shift part of the burden of the insolvency or absence to the plaintiff. We are concerned that plaintiffs would be encouraged to join all possible defendants, in order that the degree of fault of a wrongdoer who has not been made a party not be overestimated. The overall result could be increasingly complex litigation, with its attendant delay and costs. Moreover, where it is necessary to make further applications to the court for reallocation of an uncollectible amount, the result would be additional costs to the parties and an increased burden on an already overtaxed court system. In our view, the potential inconvenience and uncertainty that could result from a modification of the existing rule of *in solidum* liability outweighs the occasional benefit it might offer to concurrent wrongdoers.

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[54] See *supra*, this ch., sec. 3(b).

For the foregoing reasons, the Commission recommends that there should be no change in the law respecting the *in solidum* liability of concurrent wrongdoers to a plaintiff, even where the plaintiff is contributorily negligent.[55]

We do, however, wish to address the issue of how the risk of insolvency or absence on the part of one concurrent wrongdoer should be shared among a number of solvent concurrent wrongdoers. Where there are more than two wrongdoers, and one wrongdoer is insolvent or otherwise unavailable to satisfy her share of liability, the *Negligence Act*[56] is silent regarding how the burden of the insolvent or unavailable wrongdoer's portion of liability is to be absorbed as between the remaining solvent wrongdoers. In such a case, we believe it would be equitable, and we therefore recommend, that the liability of a concurrent wrongdoer who is unable to satisfy her share of liability should be divided between the remaining concurrent wrongdoers in proportion to their respective degrees of fault, without discharging the liability to contribute of the defaulting concurrent wrongdoer.[57]

RECOMMENDATIONS

The Commission makes the following recommendations:

1. There should be no change in the law respecting the *in solidum* liability of concurrent wrongdoers to a plaintiff, even where the plaintiff is contributorily negligent.

2. Where there are more than two concurrent wrongdoers, and one wrongdoer is insolvent or otherwise unavailable to satisfy her share of liability, that share should be divided between the remaining wrongdoers in proportion to their respective degrees of fault, without discharging the liability to contribute of the defaulting concurrent wrongdoer.

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[55] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 4. The Act appears as an Appendix of this Report. Contributory negligence is considered *infra*, ch. 10.

[56] *Supra*, note 3.

[57] Draft Act, s. 9(6).

CHAPTER 4

THE NATURE AND SCOPE OF THE RIGHT TO CONTRIBUTION

1. INTRODUCTION

This chapter considers the nature, as well as the present and appropriate scope, of a right to contribution among concurrent wrongdoers, including contract breakers, and those whose civil liability depends upon a common debt. We shall consider first the common law and equitable background against which a right of contribution among concurrent tortfeasors was first introduced in Ontario in *The Negligence Act, 1930*.[1] In doing so, the restitutionary principles upon which the right to contribution and other similar rights are based will become clear. In the next section we examine the types of liability that currently give rise to the right of contribution and, after considering the principal objections to and justifications for retaining the right, we recommend new legislation to extend the range of civil liabilities from which a right to contribution can arise. Also addressed briefly are the remedies that should be available to a person who is entitled to contribution from another.

2. CONTRIBUTION AND RELATED CLAIMS: COMMON LAW, EQUITY, AND THE PRINCIPLE OF UNJUST ENRICHMENT

We turn first to consider the common law and equitable foundations of contribution and other related claims.[2] While contribution claims are the primary focus of this Report, related claims involving the discharge of D2's liability to P by D1 form an important part of the backdrop to our later discussion of the scope of the right to contribution. Moreover, as we shall see, the fundamental, unifying principle that underlies all these claims—and, indeed, that forms the basis of the present statutory right to contribution among tortfeasors—is essentially the same.

The common features of the several kinds of right to which reference has just been made are that they enable a person (D1), who is subject to a common legal demand with another (D2) to a third person (P), to recover from D2 the whole or part of a payment made by D1 to P that discharges all

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[1] S.O. 1930, c. 27, s. 3.

[2] See, generally, Goff and Jones, *The Law of Restitution* (2d ed., 1978), chs. 12, 13, and 14, and Fridman and McLeod, *Restitution* (1982), chs. 11 and 12.

or part of the liability of D2 to P. In the case of contribution, D1 is entitled to recover from D2 the amount that D1 paid to P that, as between D1 and D2, exceeded the proportionate share of D1's liability. Both D1 and D2 are, in this sense, "equally" responsible for the discharge of the common liability to P. This is to be distinguished from what has been called "recoupment"; in the latter case, while both D1 and D2 are liable to P, D1's right against D2 arises from the fact that D2 is primarily liable and that, under compulsion of law, D1 has made a payment to P that has discharged fully D2's primary liability. In the recoupment cases, D1 always seeks *total* reimbursement, whereas in the contribution cases D1 seeks to recover only his proportionate share.

In the case of both contribution and recoupment, D2 has received a benefit by D1's payment, since D2's liability to P has been discharged. Put another way, it may be said that D2 has been unjustly enriched by D1's payment discharging D2's liability, whether the extent of the unjust enrichment is merely as to the portion of the payment attributable to D2's share of the liability (in the case of contribution) or as to the total amount of the payment (in the case of recoupment). This restitutionary principle of unjust enrichment forms the basis of nearly all contribution and related claims at common law and in equity, and provides the underlying rationale of the right to contribution among concurrent tortfeasors found in the *Negligence Act*.[3]

The classic restitutionary analysis, distinguishing contribution from recoupment and other restitutionary claims, illustrates a somewhat tangled skein of common law and equitable rules. While, for the most part, these rules are unified by the governing principle of unjust enrichment, they depend to some extent on the particular nature of the relationship between D1 and D2. Indeed, the very distinction between contribution claims and recoupment claims rests on this factor. We now turn briefly to a consideration of these two sets of claims, beginning with the right to contribution.

Subject to any contractual provision to the contrary, rights of contribution have been granted by the courts between sureties, joint contractors, trustees, company directors, partners, co-insurers, mortgagors, and joint tenants, where one of the parties has paid more than her proportionate share of the common obligation.

It has been said that it was in the surety cases, especially *Deering v. The Earl of Winchelsea*,[4] that the nature of the right to contribution was first determined.[5] Before the start of the nineteenth century, it appears that a claim to contribution had to be founded upon equitable principles, for the

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[3] *Negligence Act*, R.S.O. 1980, c. 315.

[4] (1787), 2 Bos. & Pul. 270, 126 E.R. 1276 (Ex.).

[5] Goff and Jones, *supra*, note 2, at 211. See, also, *ibid.*, at 212-21.

early common law basically rejected such claims.[6] The principles developed initially by equity for the surety cases—principles that became dominant after 1873[7]—were soon extended to the types of relationship noted in the preceding paragraph. While "[c]omplete consistency of principle has not, of course, been achieved", the divergences that arose from certain unique attributes in the various types of relationship were, and remain, "comparatively insignificant".[8] The governing equitable principle of unjust enrichment permitted the courts to do justice where D1 conferred a benefit on D2 by discharging all or part of the latter's liability to P, whether D1 and D2 were jointly or only severally liable.[9] The analogy of the surety cases continues to prevail in almost all cases where concurrently liable obligors are involved.

A notable exception was in the case of concurrently liable tortfeasors. As a general proposition, at common law no right of contribution was given to a concurrent tortfeasor (D1) who had discharged her liability to P (whether as a result of an out-of-court payment or an adverse judgment) and thereby satisfied, in whole or in part, P's cause of action against another (D2) whose tortious conduct caused the same loss to P. The prohibition began in the case of joint tortfeasors,[10] but was later said to govern the rights of several, concurrent tortfeasors.[11] At first blush, one would have expected equity, animated by the restitutionary principle of unjust enrichment, to have extended its reach to concurrent tortfeasors; but, somewhat surprisingly in light of its expansion elsewhere, no such development took place.

The general refusal of the common law to countenance claims for contribution among concurrent tortfeasors is usually traced to the decision

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[6] *Ibid.*, at 231.

[7] *Ibid.*, at 213.

[8] *Ibid.*, at 211.

[9] This is not to suggest that the law is completely satisfactory. For example, the equitable doctrine of contribution applies in the case of trustees where they are both wrongdoers. Trustees are liable *in solidum* to the beneficiaries for any loss caused by a breach of trust. A trustee can claim by way of contribution from her co-trustees any sum that she has paid to a beneficiary in respect of a breach of trust, for which all the trustees are liable, that exceeds the total liability divided by the number of solvent trustees (see Waters, *Law of Trusts in Canada* (2d ed., 1984), at 1006-08). However, the courts have generally refused to investigate the comparative responsibility of the trustees. Thus, apart from some exceptional circumstances in which one trustee is entitled to a complete indemnity from a co-trustee, the general rule is that the court can only order the trustees to contribute in equal shares. In its *Report on the Law of Trusts* (1984), Vol. II, at 374-86, this Commission recommended that courts be given a much greater discretion to apportion the liability of trustees *inter se*.

[10] *Merryweather v. Nixan* (1799), 8 T.R. 186, 101 E.R. 1337 (K.B.); *Sutton v. Town of Dundas* (1908), 17. O.L.R. 556 (C.A.); and *McGlade v. Pashnitzky and Macey Sign Co. Ltd.* (1921), 50 O.L.R. 547, 64 D.L.R. 592 (App. Div.).

[11] *Horwell v. London General Omnibus Co. Ltd.* (1877), 2 Ex. D. 365, at 379; *Till v. Town of Oakville* (1914), 33 O.L.R. 120, 21 D.L.R. 113 (App. Div.); and *Esten v. Rosen*, [1929] 1 D.L.R. 275 (Ont. App. Div.). See, generally, Goff and Jones, *supra*, note 2, at 231 *et seq.*

in *Merryweather v. Nixan*.[12] The principal rationale of the rule was that the law should not allow a person to found a cause of action upon his own wrongdoing: *ex turpi causa non oritur actio*. Since the tort involved in *Merryweather v. Nixan* was conversion, one might have thought that the application of the reasoning in that case would be limited to intentional or similar wrongdoing. However, the rule has been extended to unintentional torts and, according to Goff and Jones, appears to have been "rapidly and uncritically accepted"[13] as part of the law until the advent of statutory reform.[14]

The vice of the rule—which was said to have had a "baneful influence on English law"[15]—was that it enabled the injured person not only to select which concurrently liable defendant to sue, but also by that choice to ensure, if the plaintiff's action was successful, that the defendant against whom she proceeded would bear the entire loss. Thus, the effect of the rule in *Merryweather v. Nixan* was to prevent the person being sued from shifting part of the loss to others who were equally liable to the plaintiff, and, indeed, who might be more culpable than the party who had been required to compensate the injured person. We shall return to a fuller consideration of the common law position at a subsequent juncture.[16] Suffice it to note here that the rule in *Merryweather v. Nixan* appeared increasingly anachronistic as fault emerged as the fundamental notion upon which the law of torts rested. As we have seen, the common law rule was abolished in Ontario in 1930.[17]

We noted earlier in this section that the issue of compensation to D1 in respect of D1's payment to P may arise not only in the case of contribution, where D1 has paid more than her proportionate portion of the common liability shared with D2, but also in the case of recoupment, where D1, who is only secondarily liable to P, pays P under compulsion of law and thereby discharges the full liability of D2, who is primarily liable to P.

The classic statement respecting recoupment appears in *Moule v. Garrett*,[18] where Cockburn C.J. stated:[19]

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[12] *Supra*, note 10.

[13] Goff and Jones, *supra*, note 2, at 231.

[14] But see Williams, *Joint Torts and Contributory Negligence* (1951), at 83. Williams discusses several exceptions to the rule in *Merryweather v. Nixan* and states that, "[i]n view of these cases, and other American cases to the same effect, the view may be taken that, even at common law, the rule...applies only as between conscious, wilful, malicious or intentional tortfeasors". Goff and Jones note that the common law exceptions to the rule were few (*supra*, note 2, at 231).

[15] *Ibid*.

[16] See *infra*, this ch., sec. 3(a)(i).

[17] See *supra*, note 1.

[18] (1872), 7-8 L.R. Exch. 101. See, generally, Goff and Jones, *supra*, note 2, ch. 14.

[19] *Supra*, note 18, at 104.

> Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.[20]

Unlike the right to contribution, the origins of which may be traced to equity, the "right to claim money paid as on the compulsory discharge of another's liability has its roots in the common law action of money paid".[21] This right to recoupment has been described as being a quasi-contractual right,[22] often said to rest on the implied promise by D2 to reimburse D1. This latter notion has not been finally dispelled in England. Canadian courts, on the other hand, have been much quicker to recognize that D2's obligation to reimburse D1 is often imposed by operation of law, and that whether the law will impose an obligation has much more to do with restitutionary principles of unjust enrichment than with the presumed intention of the parties.[23]

Viewed in this light, there are obvious similarities between the equitable right to contribution and the common law rule that enables D1 to recover compensation from D2 where D1 has been compelled by law to discharge an obligation that, as between D1 and D2, rested primarily or ultimately upon D2. Even in England, the leading commentators state unequivocally that the "basis of this right [to recoupment] is similar to that which underlies the right to contribution".[24] Moreover, the English Court of Appeal has recently noted the resemblance between the statutory right to contribution among tortfeasors and the common law claim for money paid to the use of the defendant who has, *pro tanto*, been relieved of a liability to a third party.[25] The principal difference is that a right to contribution generally enables D1 to shift to D2 part of the cost of D1's payment to P, whereas under the common law rule respecting recoupment, D1 is normally entitled to be reimbursed by D2 for the whole amount.

Despite the broad restitutionary basis of the claim to recoupment, the types of case in which the rule in *Moule v. Garrett* has been applied have

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[20] It bears noting here that another prerequisite to a successful claim for recoupment is that D1 must not have officiously exposed herself to liability to P in order to make the payment.

[21] Fridman and McLeod, *supra*, note 2, at 348.

[22] Goff and Jones, *supra*, note 2, at 258.

[23] The decision in *Deglman v. The Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785, contains the first important statement of general principle in this area of the law by the Supreme Court of Canada.

[24] Goff and Jones, *supra*, note 2, at 244.

[25] *Ronex Properties Ltd. v. John Laing Construction Ltd.*, [1983] Q.B. 398, at 407, [1982] 3 All E. R. 961 (C.A.).

been relatively restricted.[26] However, it has also been said that the very nature of the principles governing recoupment means that the existing categories of cases are not, in fact, closed.[27]

Before we turn to an assessment of the present law, brief mention should be made of one further, and related, type of restitutionary relief, namely, subrogation, which has been said to be similar to a claim for recoupment.[28]

Although the extent to which the courts recognize a generalized right to subrogation to prevent unjust enrichment is as yet unclear,[29] the situations in which such a right is already accepted may be rationalized as follows. Subject to contractual terms, a right to subrogation may be given where a payment by D1 to P, which D1 is generally required by law to make, has conferred a benefit upon D2—often by discharging a liability to P—and where it is just to allow D1 the benefit of any rights or property available to P against D2. In other words, D1 essentially stands in the shoes of P to enforce P's rights against D2.

While the "actual origins of the doctrine of subrogation are unclear... [t]he doctrine...appears to have originally developed in both law and equity" and "can be regarded as a doctrine of general application throughout the law of restitution".[30] One of the most familiar situations in which a right to subrogation arises is when a surety has been required by the creditor to pay on the surety's guarantee. The surety is entitled to enforce any security that the creditor has taken from the principal debtor. An indemnity insurer also has a right to be subrogated to the assured's cause of action against a person who is legally liable to the assured for the loss.[31] In addition,

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[26] Goff and Jones, *supra*, note 2, at 245. The most familiar situations include the right of the original lessee of premises to recover from the assignee of the lease any sum that the former has been required to pay to the lessor for a breach of covenant committed while the assignee was in possession. Other cases concern a person whose goods have been distrained by a lessor while they were, with the consent of the tenant, on the leased premises. Since the tenant has the ultimate obligation to pay the rent, the owner of the distrained goods can recover from the tenant what the owner was required to pay to the lessor in order to obtain the goods. The owner's payment will have discharged the tenant's arrears in rent. A surety's right to indemnity from the principal debtor may also be explained on similar principles. Finally, recoupment has been allowed in cases of abatement of nuisances.

[27] *Ibid.*

[28] At one point, Fridman and McLeod state that there is a similarity at a "definitional level" (*supra*, note 2, at 347, *n.* 3). At another point, the authors say that the "doctrine [of subrogation] is similar to the rules regulating the compulsory discharge of another's liability" (*ibid.*, at 385).

[29] For a conservative view of the applicability of subrogation, see *Orakpo v. Manson Investments Ltd.*, [1978] A.C. 95, [1977] 3 W.L.R. 229 (H.L.). See, generally, Goff and Jones, *supra*, note 2, ch. 27.

[30] Fridman and McLeod, *supra*, note 2, at 386.

[31] But here, it should be noted, the insurer's payment does not discharge the wrongdoer's liability to the assured.

subrogation has been used in bills of exchange cases, trust cases, and "other cases not falling within these subject areas where the general policy considerations which led to the invocation of the doctrine in such areas were also present".[32]

As in the case of contribution and recoupment, the principles in one area of the law of subrogation are not always entirely consistent with those developed in the other areas. However, a great deal of similarity exists, particularly in respect of basic philosophy. Not surprisingly, it has been observed that "the doctrine [of subrogation] is imposed to prevent an unjust enrichment".[33]

As we said at the outset, recoupment, subrogation, and contribution (including the statutory right to contribution among tortfeasors)[34] exhibit certain broad, common features that make it possible, despite certain doctrinal differences, to identify a uniform rationale, namely, the restitutionary principle of unjust enrichment. We shall return to this theme in the following sections, where we consider the adequacy of existing rights to contribution.

3. THE SCOPE OF THE RIGHT TO CONTRIBUTION

(a) Torts

(i) Should the Right to Contribution Be Abolished?

As we have seen, in Ontario, as in other common law jurisdictions, rights of contribution among tortfeasors are the product of statute. When reform was under active consideration in the United States, a spirited defence of the rule in *Merryweather v. Nixan*,[35] but not its original rationale, was made in a short article written in 1941 by Professor Fleming James Jr. of the Yale Law School.[36] James' main argument is that an essential function of the law of torts is the efficient and equitable distribution of loss. An

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[32] Fridman and McLeod, *supra*, note 2, at 386. The authors comment that "[w]hether the cases falling outside the established heads of subrogation are classed as examples of subrogation or a right akin to subrogation is in large part a matter of semantics" (*ibid.*). See, also, *ibid.*, at 408.

[33] *Ibid.*

[34] Goff and Jones state (*supra*, note 2, at 231) that, while "a tortfeasor's claim to contribution is *sui generis* [in that it is statutory]...the broad principles governing it are not dissimilar from the equitable principles which were established in *Deering v. The Earl of Winchelsea* [*supra*, note 4]". For a similar view, see Fridman and McLeod, *supra*, note 2, at 378.

[35] *Supra*, note 10.

[36] James, "Contribution Among Joint Tortfeasors: A Pragmatic Criticism" (1940-41), 54 Harv. L. Rev. 1156. For a reply, see Gregory, "Contribution Among Joint Tortfeasors: A Defense" (1940-41), 54 Harv. L. Rev. 1170. Further sallies by these commentators are contained *ibid.*, at 1178 (James) and 1184 (Gregory).

injured person who may have a claim for a loss against more than one person will normally pursue the person from whom she is most sure of recovering. Thus, the injured person will often seek a corporate defendant or a person who is insured against the loss. To allow the defendant who is sued by the plaintiff to claim contribution will often have the effect of redistributing the plaintiff's loss to those who are likely to be less well placed to pass it on. Typically, this will be from an insurance company to an uninsured individual, a result, James argues, that is economically inefficient and socially unjust. He also points out that as the incidence of insurance increases, the absence of a right to contribution will have no serious adverse effects upon insurance premiums, since, over time, insurance companies are likely to be the beneficiaries as often as they are the "victims" of a defendant's inability to redistribute the loss for which the defendant is liable to the plaintiff.

A well-known illustration of the argument that a right to contribution or indemnity may well work hardship or frustrate policies of fair and efficient loss distribution is provided by the decision of the House of Lords in *Lister v. Romford Ice and Cold Storage Co. Ltd.*[37] In that case, the insurer of an employer, who had been held vicariously liable for personal injuries caused by an employee, required the employer to sue for an indemnity from the employee-tortfeasor.[38] The duties owed by parents to take reasonable care to protect their children from injury may also give rise to contribution claims from insured drivers who negligently injure a child.[39]

In addition to the arguments based upon equitable loss distribution, opponents of a right to contribution among tortfeasors argue that the addition of third parties from whom the party-defendant wishes to claim contribution may make the litigation more lengthy, costly and complex, and

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[37] [1957] A.C. 555, [1957] 1 All E.R. 125 (H.L.).

[38] It should be noted, however, that in all probability this case would have been decided in the same way even had the rule in *Merryweather v. Nixan*, *supra*, note 10, still existed. The employer was able to rely not only upon his statutory right to contribution, but also upon an implied term in the contract of employment that the employee would indemnify the employer against any liability that the employer incurred as a result of the employee's negligence.

After this decision, which was widely criticized, the insurance industry in England agreed that insurance companies would generally not exercise any right of subrogation when the employer was vicariously liable for an injury caused by one of the employees to a co-employee. For a case that arose out of a situation not covered by this "understanding", see *Morris v. Ford Motor Co. Ltd.*, [1973] Q.B. 792, [1973] 2 All E.R. 1084 (C.A.) (insurer refused a right to be subrogated to employer's right of action against employee for injury done to an employee of another company). But see *Greenwood Shopping Plaza Ltd. v. Beattie and Pettipas*, [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257, where an insurer was subrogated to the rights of its assured, a lessor, for damage to the demised premises that was caused by the negligence of the tenant's employees.

[39] The facts of *Arnold v. Teno*, [1978] 2. S.C.R. 287, provide an illustration, although, as it happened, the parent was not found to have been negligent.

that this can only be to the detriment of the plaintiff.[40] The plaintiff's procedural and tactical advantages that flow from being in control of the action should not, it is argued, be lightly dissipated. Moreover, many contribution schemes contain provisions that prejudice the plaintiff's rights, in the sense that the plaintiff may be worse off than she would have been had one of the defendants been the sole tortfeasor. For instance, under the American Uniform Comparative Fault Act, approved by the National Conference of Commissioners on Uniform State Laws,[41] a plaintiff (especially if contributorily negligent) may be required to bear part of the risk of the insolvency of one defendant; or if the plaintiff makes a poor settlement with D1, she may be unable to obtain full satisfaction from D2.[42]

Finally, it is argued, the reason contribution makes such a strong appeal to our notions of justice is that we imagine the individual defendant having to bear what might be a single, crippling loss as a result of one, perhaps isolated, negligent act that has produced grave injurious consequences for the plaintiff. To force this hapless individual to meet the entire loss, while another equally negligent person walks away scot free, is intolerable. But this image of the typical tortfeasor is but a caricature of reality, which is that, in a great and increasing number of cases, defendants are insured; indeed, if they are owners of vehicles they are legally required to carry insurance. The true "defendants" are insurance companies who have exacted premiums for the

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[40] Another commentator, writing more than forty years after Commonwealth jurisdictions first abolished the rule in *Merryweather v. Nixan*, *supra*, note 10, sums up his position as follows (Weir, Int'l Enc. Comp. L. XI Torts (1983), ch. 12 (Complex Liabilities), at 78):

> The right of recourse is born of the fear that the victim [P] will act arbitrarily and the desire to promote equality between all those liable, an increasing number, by bringing the loss home to those responsible. But the institution [that is, the right to contribution], as developed, leads not only to complexities beyond the tolerable, but also to unfairness at every step. Thanks to this device, prompted as it is by powerful ideals, the victim finds his rights curtailed, their vindication complicated and their settlement impeded. Thanks to this device also, the contributor finds himself liable when he would not otherwise be liable for longer than he would otherwise be, and liable to be sued a second time. That all this should be done at the instance and for the benefit of one who was *ex hypothesi* liable to the victim seems really excessive.

It is also worth noting that Dean Cecil A. Wright's attitude to the statutory abolition of the common law rule prohibiting contribution amongst tortfeasors was somewhat skeptical:

> Apart from fundamental questions of policy, the contribution statutes certainly open a number of new problems whose very complexity may, in the end, outweigh the theoretical value of spreading liability according to fault.

Wright, *Cases on the Law of Torts* (4th ed., 1967), at 393. The matter is discussed *ibid*., at 392-93.

[41] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part), §2(d). The Act was approved by the Commissioners in 1977.

[42] See, for example, the Irish *Civil Liability Act, 1961*, No. 41, s. 17(2).

policies and then try, through subrogation and contribution, to shift onto other shoulders the cost of the risk that they have bargained with the assured that they will bear. To allow the loss to lie where it falls will, in the long run, benefit insurers as often as it harms them.

There are a number of ways in which these objections to contribution may be met. First, the argument assumes that the primary function of the law of torts is to distribute loss to those best able to bear it. But this ignores the importance of fault, which, for better or worse, still permeates the law of torts. Even if it is accepted that our law should be moving towards an insurance-based no-fault system of liability, it has not yet done so. To attempt to give partial effect to this ideal indirectly through the law of contribution seems less than satisfactory. The issue needs to be met head on by reforming, if necessary, the primary rights and obligations between the injured person and the wrongdoer. The tail of secondary obligation should not wag the dog of primary liability.

Secondly, simply to abolish the right to contribution among wrongdoers would be an unsatisfactory way of achieving the goals of the abolitionists. For it would leave decisions about the optimal distribution of loss to the plaintiff when she exercises her choice of defendants. It does not necessarily follow that a plaintiff will always select as defendant the institution or person who can most efficiently distribute the loss that the plaintiff has suffered. For instance, one wrongdoer may be selected by the plaintiff because the other is out of the jurisdiction. And what if the plaintiff selects, in error perhaps, a defendant who is not insured? Or what if all possible defendants carry insurance? Moreover, a right to contribution does not necessarily shift a loss from the financially strong to those less well endowed, because lack of resources may as effectively insulate a person from a claim for contribution as from a claim for compensation by the injured person.

Thirdly, it is also possible that the abolition of a right to contribution may discourage those who engage in risk-creating activities from insuring against injury to another, in the hope that someone else will be insured and, consequently, more likely to be sued by the injured person. By exposing all who engage in activities that entail a risk of injury to others to the possibility that they will have to bear a portion of any losses caused by their activities, the law encourages the taking of proper care and the purchase of insurance. A right of contribution thus may well promote the proper allocation of loss by "internalizing" the risk.

Despite the attractiveness of some of the arguments advanced against a right to contribution among tortfeasors, the Commission does not recommend its abolition. Under the present fault-based tort regime, the Commission is firmly of the view that, as a matter of fairness, a right to contribution is essential in order to preclude the unjust enrichment of the non-paying concurrent wrongdoer. It may well be that a right to contribution would not be efficacious or desirable under another type of legal regime. Accordingly, the existence of such a right should be considered in the context of any

fundamental re-examination of the bases of primary liability for personal injuries and the merits of extending compulsory insurance to a much wider range of risk-creating activities. More limited solutions to the problem illustrated by *Lister v. Romford Ice and Cold Storage Co. Ltd.* could include, for example, amendments to the *Insurance Act*[43] to extend the benefit of the policy to all whose activities are covered by it.

(ii) The Present Law

Having rejected, as a matter of policy, the abolition of a right of contribution among tortfeasors, we now turn to consider the scope of the present right of contribution under the *Negligence Act*.

Section 2 of the Ontario *Negligence Act*[44] provides for a right of contribution "[w]here damages have been caused or contributed to by the *fault or neglect* of two or more persons": the court is to determine the degree in which each is "at fault or negligent" and make an order for contribution accordingly. Later sections of the Act, which deal with more specific points of the scheme, refer simply to a "tort feasor". Thus, section 3 provides for a right to contribution after one person has made a settlement with the injured party.[45] The person claiming contribution and the person from whom it is claimed are designated as "tort feasors". The same terminology is used in section 9,[46] which provides for the effect upon a contribution claim of the expiry of a limitation period within which P must sue D2.

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[43] R.S.O. 1980, c. 218.

[44] *Supra*, note 3. A specific right of contribution is provided by the *Securities Act*, R.S.O. 1980, c. 466, s. 126(8), among those liable under s. 126(1) for misrepresentations in a company prospectus.

[45] Section 3 reads:

> 3. A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

[46] Section 9 reads:

> 9. Where an action is commenced against a tort feasor or where a tort feasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tort feasor provided,
>
> (a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
>
> (b) there has been compliance with any statute requiring notice of claim against such tort feasor.

A literal construction of the *Negligence Act* might support an argument that, although the scope of section 2 is limited to those torts that involve "fault or negligence", the scope of sections 3 and 9 extends to all torts. Such an interpretation would, however, produce serious anomalies. For instance, it could mean that a right to contribution would be available following a settlement between the injured person and any type of tortfeasor, but that there would have been no such right had the injured person obtained judgment against a tortfeasor who was not "at fault or negligent". Nor would it make any sense to say that section 9 enables a right of contribution to be claimed after the expiry of a limitation period, but that if the tort on which the claim depends is not one involving "fault or neglect", then no claim could have been made if a limitation period had not expired, so that resort to section 9 would have been unnecessary.

The better interpretation is to treat section 2 as the principal section and to read the reference to "tort feasors" in the later sections as limited to those who have committed torts that fall within section 2. This raises the more important question of what torts are included within section 2. It should also be noted that the availability of the partial defence of contributory negligence provided by section 4[47] is similarly limited to "any action for damages that is founded upon the *fault or negligence* of the defendant if *fault or negligence* is found on the part of the plaintiff that contributed to the damages".[48]

At times, the courts have taken a narrow view of the scope of these sections and limited them to cases in which the plaintiff's action was for the tort of negligence.[49] Indeed, the very title of the *Negligence Act* may seem to support this conclusion.[50] A slightly more expanded version of this approach can be found in some cases in which the Act has been held to apply to tortfeasors who may not actually have been sued for the tort of negligence, but whose conduct could have supported such an action.[51] More recently, however, the Ontario Court of Appeal has adopted a significantly wider interpretation of the word "fault" and stated that it includes "a breach

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[47] Section 4 reads:

> 4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

[48] Contributory negligence is discussed *infra*, ch. 10.

[49] See Cheifetz, *Apportionment of Fault in Tort* (1981), at 24-36, where the author also draws attention to *dicta* that seem to limit s. 2 to joint tortfeasors, but which he convincingly demonstrates do not correctly state the law.

[50] See, in particular, *Aselstine v. McAnally*, [1950] O.W.N. 229 (H.C.J.); *Hollebone v. Barnard*, [1954] O.W.N. 235 [1954] 2 D.L.R. 278 (H.C.J.); *Acker v. Kerr* (1973), 2 O.R. 270, 42 D.L.R. (3d) 514 (Co. Ct.); and *Chernesky v. Armadale Publishers Ltd.* (1974), 53 D.L.R. (3d) 79, [1974] 6. W.W.R. 162 (Sask. C.A.).

[51] See, for example, *Parmley v. Parmley*, [1945] S.C.R. 635, at 650, [1945] 4 D.L.R. 81, and *Albion v. Cochrane*, [1969] 2 O.R. 184, 4 D.L.R. (3d) 667 (Co. Ct.).

of statute or other act or omission giving rise to a liability in tort whether negligent or not".[52] It has also expressly disapproved earlier cases that had confined the Act to the tort of negligence, and has endorsed the following statement of its scope:[53]

> Fault and negligence, as these words are used in the statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of sub-standard conduct.

It would thus seem clear that, at the level of the Court of Appeal at least, the Ontario *Negligence Act* provides for a right of contribution in respect of torts that are based on some blameworthy conduct, including intentional torts,[54] and may even, perhaps, extend to torts of strict liability.[55]

(iii) The Case for Expansion

If it is accepted that rights of contribution are given in order to prevent the unjust enrichment of D2, whose liability to P has been discharged by the payment by D1 to P, then there is little reason to limit contribution by reference to the kind of tort committed by D1.[56] However, one possible situation in which contribution may be thought inappropriate is where D1's tort is intentional, especially if it also amounts to a criminal offence. For

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[52] *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201, at 206, 68 D.L.R. (3d) 385 (C.A.), *per* Jessup J.A., aff'd (*sub nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*) [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 (subsequent references are to [1978] 2 S.C.R.). The Court of Appeal reversed the decision of the High Court of Justice (1974), 3 O.R. (2d) 481, 46 D.L.R. (3d) 28 (H.C.J.).

[53] *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 31. O.R. (2d) 571 (C.A.), at 572, quoting from the judgment of Linden J. below ((1980), 11 C.C.L.T. 170 (Ont. H.C.J.), at 180), which the Court of Appeal upheld. See *Long v. Gardner* (1983), 144 D.L.R. (3d) 73 (Ont. H.C.J.), where s. 4 of the *Negligence Act*, *supra*, note 3, was held to apply to the tort of intentional assault. See, also, *Anderson and G.W. Anderson Holdings Ltd. v. Stevens* (1981), 29 B.C.L.R. 355, 125 D.L.R. (3d) 736 (S.C.), where contribution was allowed between fraudulent and negligent tortfeasors.

[54] In *Parmley v. Parmley*, *supra*, note 51, the Supreme Court of Canada did not affirm the statement in the British Columbia Court of Appeal that the statute applied to intentional as well as negligent trespass.

[55] Only the *dictum* of Jessup J.A. in the *Dominion Chain Co. Ltd.* case, *supra*, note 52, supports this view, although *Dokuchia v. Domansch*, [1945] O.R. 141, [1945] 1 D.L.R. 757 (C.A.) would also seem to be to this effect. Inconsistent with this view is *Pickin v. Hesk and Lawrence*, [1954] O.R. 713, [1954] 4 D.L.R. 90 (C.A.), in which a claim for contribution was made by an employer against a person for whose tortious conduct he had been held vicariously liable. See, however, *Lang v. Hooey*, [1932] O.R. 363, [1932] 2 D.L.R. 778 (C.A.), and *Flamant v. Knelson* (1971), 21 D.L.R. (3d) 357 (B.C.S.C.).

[56] That there are no *general* reasons of public policy for denying a right to contribution in respect of strict liability is indicated by the *Dog Owners' Liability Act*, R.S.O. 1980, c. 124. Under this Act, a person may be liable for personal injuries caused by her dog, irrespective of any fault on the part of the owner (s. 2(3)), and a right of contribution (s. 2(4)) can arise even though the defendant was not at fault.

instance, should a thief, who has been held liable to P for the conversion of P's goods, recover contribution from the innocent purchaser to whom the thief sold them, who, in turn, may well also be liable to the true owner for conversion or detinue? In most cases, it is suggested, a court will be able to take into account any dishonesty or other form of intentional wrongdoing by D1 by the exercise of its discretion to apportion the amount of contribution payable in accordance with the defendants' respective degrees of fault. In the hypothetical suggested above, the quantum of D2's contribution would almost certainly be nil.

What then of the case where the torts of both D1 and D2 amount to criminal offences for which a guilty intention is required? Should a thief be entitled to contribution from the thief's accomplice who disposed of the property in full knowledge that it had been stolen? There is a natural reaction against requiring the courts to adjust the mutual rights and obligations of those who have deliberately broken the law. It is tempting to fall back upon the maxims *ex turpi causa non oritur actio* and *in pari delicto potior est conditio possidentis*. In addition, a right to contribution will undermine any punitive or deterrent aspects of liability for intentional torts, including cases in which the conduct in question is criminal.[57]

More careful analysis strongly suggests, however, that the above maxims do not always provide a satisfactory solution. First, there is the difficulty of defining the tortious conduct that would be excluded from a right to contribution; to exclude torts that are also crimes is unsatisfactory because this could include minor offences or offences of strict liability. To define the exception in terms of "serious crimes" or "crimes of moral blameworthiness" may be unduly vague. Alternatively, a defendant could be denied a right to contribution if the defendant has committed an intentional tort. But this is also likely to be an inadequate method of screening out those persons who ought not to be allowed to profit from their own wrong. Is it so clear that the intentional trespasser to land, for example, is obviously less entitled to relief, than, say, the grossly negligent driver who kills a pedestrian?

Secondly, it might be argued that the punishment of wrongdoing is principally the function of the criminal law, with its special evidentiary rules and procedural protections. It is not easy to see why D2, who may be as morally blameworthy as D1, should reap the benefit of a rule designed to penalize D1. Nor is it inherently likely that an absolute denial of contribution will deter potential wrongdoers: such a regime offers one wrongdoer the chance of keeping the fruits of her crime.[58] Experience suggests that a high probability of detection and punishment is a more effective deterrent than a

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[57] These considerations appear to have been influential in the decision of the Supreme Court of the United States to deny a right to contribution to those found guilty of anti-competitive conduct and liable to pay treble damages: see *infra*, notes 71-73.

[58] Criticisms along these lines have also been levelled at the common law rule that a party to an illegal contract is generally barred from recovering any money paid or benefit conferred under it: see Goff and Jones, *supra*, note 2, at 340-42.

low probability of suffering a Draconian penalty. In any event, each wrongdoer will normally be required to bear part of the loss caused by the unlawful conduct.

Thirdly, whatever policy is sought to be achieved by excluding certain torts from an accompanying right to contribution is always at the mercy of the plaintiff's choice of defendant. If D1 and D2 are both blameworthy, then it seems somewhat capricious to allow P to choose upon whom the entire burden of the loss is to fall. The loss that could fall upon D1 may be quite disproportionate to the seriousness of D1's wrong, especially if the other wrongdoer escapes.

A further question is whether a defendant who has been held liable to pay punitive damages to the injured person should be able to claim contribution from other persons who are concurrently liable to the plaintiff. Of course, the issue arises only where D2 is (or would, if sued) be liable to pay a sum that is at least as great, and in respect of the same loss, as D1. If D2 is not so liable, then D1's payment confers no benefit upon D2, for D1's payment has not discharged a liability that D2 would otherwise have had to bear.[59]

It may be argued that the purpose of imposing punitive damages is to punish and deter, and that these purposes will be frustrated if the defendant is allowed to pass on part of her "punishment" to another. It is submitted, however, that the reasoning here is no more attractive than the arguments considered above for excluding from potential contribution claims intentional tortfeasors or those whose torts constitute crimes. The deterrent effect of refusing contribution must be, at best, equivocal. And to concentrate on the justice of D1's "taking her punishment" ignores the fact that another wrongdoer is escaping. Again, if there were no right of contribution, then the plaintiff's choice of defendant would determine which wrongdoer was to be punished.

(iv) Other Jurisdictions

Statutes in other jurisdictions differ quite markedly in their approach to the range of torts that can give rise to a right to contribution. For instance, section 6(1) of the English *Law Reform (Married Women and Tortfeasors) Act, 1935*[60] provided that a right to contribution arose "[w]here damage is suffered by any person as a result of a tort (whether a crime or not)...". Although the words in parenthesis are not included in the more recent *Civil Liability (Contribution) Act 1978*,[61] there is no indication that Parliament in

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[59] See, generally, *infra*, ch. 8, sec. 2, dealing with the calculation of the sum to be paid by D2 to D1.

[60] *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30 (U.K.).

[61] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.). Section 9(2) of this Act repealed s. 6 of the 1935 Act.

any way intended to impose a narrower scope to the wrongs capable of giving rise to a claim to contribution. Indeed, since the 1978 Act has given a right to contribution in respect of a much wider range of civil liabilities than that contemplated by the earlier statute,[62] it is unlikely that the omission of any specific mention of intentional wrongs should be regarded as signalling a legislative intention to limit the availability of contribution. The Irish *Civil Liability Act, 1961*[63] specifically includes in the definition of "wrongdoer" a "person who commits or is otherwise responsible for a wrong", "whether or not the act is also a crime, and whether or not the wrong is intentional".[64] The Report prepared by the Alberta Institute of Law Research and Reform also recommends that a reformed contribution statute should not exclude intentional torts,[65] and the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada,[66] includes intentional torts within the "wrongful act" that may give rise to contribution.[67]

On the other hand, many jurisdictions in the United States, and elsewhere, exclude intentional tortfeasors from contribution claims.[68] The 1955 American Uniform Contribution Among Tortfeasors Act[69] provided:

> 1.—(c) There is no right of contribution in favour of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

However, the American Uniform Comparative Fault Act,[70] approved in 1977, does not contain this explicit exclusion. It is also interesting to note in this context that at one time some Circuit Courts of Appeals in the United States favoured a right of contribution among those liable to pay treble damages for breach of the anti-trust laws.[71] Such breaches are always intentional. However, the Supreme Court has recently held that no right of

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[62] Those whose liability may expose them to a claim for contribution are not confined to tortfeasors, but include those liable for breach of contract and breach of trust (*ibid.*, s. 6(1)). See *infra*, this ch., sec. 3(b).

[63] *Supra*, note 42.

[64] *Ibid.*, s. 2(1).

[65] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"), at 40, Recommendation 9. See, generally, *ibid.*, at 37-40.

[66] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

[67] *Ibid.*, s. 1.

[68] See Weir, *supra*, note 40, at 64-65.

[69] National Conference of Commissioners on Uniform State Laws, Uniform Contribution Among Tortfeasors Act, Uniform Laws Annotated, Vol. 12, §1(c). The Act was approved by the Commissioners in 1955.

[70] *Supra*, note 41.

[71] A claim was first allowed in *Professional Beauty Supply Inc. v. National Beauty Supply Inc.*, 594 F. 2d 1179 (8th Cir. 1979). For *dicta* to the same effect, see *Heizer Corp. v. Ross*,

contribution is available.[72] It reasoned that since the purpose of the Sherman-Clayton Acts is to punish past violations and to deter future unlawful conduct, it would be inconsistent with the legislative policy to imply a right to contribution. It also held that the limited powers of the courts to develop federal common law did not authorize their creation of a non-statutory right of contribution among those liable for a breach of the anti-trust legislation. However, the Senate Judiciary Committee and the Anti-Trust Law Section of the American Bar Association have recommended the legislative adoption of contribution provisions in such suits.[73]

(v) Conclusions

The Commission has concluded, and therefore recommends, that the right to contribution among concurrent tortfeasors should be available in respect of *any* tort committed by more than one defendant whose conduct has contributed to a single loss sustained by the plaintiff.[74] The criminal nature of the tort, the fact that it was committed intentionally or that the damages paid by a defendant include a penal or punitive element, should not automatically bar a right of contribution.[75] Such factors will be relevant, however, to the court's exercise of discretion over the quantum of contribution awarded, a topic discussed in chapter 8 of this Report.

(b) Other Kinds of Civil Liability

The next question is whether wrongdoers who are not tortfeasors but who have caused a single loss to an injured person should enjoy the same

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601 F. 2d 330 (7th Cir. 1979). For an analysis of *Professional Beauty Supply Inc.*, see Stevenson, "Contribution Among Antitrust Violators: *Professional Beauty Supply Inc. v. National Beauty Supply Inc.*" (1979-80), 21. B.C.L. Rev. 969. A claim was subsequently denied in *Wilson P. Abraham Construction Corp. v. Texas Industries Inc.*, 604 F. 2d 897 (5th Cir. 1979). The issues are well discussed in Schwartz, Simpson and Arnold, "Contribution in Private Actions under the Federal Antitrust Laws" (1979), 33 Sw. L.J. 799. See, also, Note, "Contribution in Private Antitrust Actions" (1980), 93 Harv. L. Rev. 1540.

[72] *Texas Industries, Inc. v. Radcliff Materials, Inc.* 451 U.S. 630 (1981). See, also, *British Airways Board v. Laker Airways Ltd.*, [1984] Q.B. 142, [1983] 3 All E.R. 375, at 385, and [1983] 3 All E.R. 395 (C.A.), at 407, rev'd [1985] A.C. 58, [1984] 3 All E.R. 39 (H.L.).

[73] See Millstein, "Contribution under Antitrust Laws: Is Consensus Emerging?", Nat. L.J. (November 19, 1979), at 22 *et seq.* And see Polden and Sullivan, "Contribution and Claim Reduction in Antitrust Litigation: A Legislative Analysis" (1983), 20 Harv. J. Legis. 397.

Also of interest in this context is the Report of Consumer and Corporate Affairs Canada, *Proposals for a Securities Market Law for Canada* (1979), which includes a right to contribution among those who violate the provisions of the proposed draft *Canada Securities Market Act* (see s. 13.18). For commentary on the recommendations contained in this Report, see Vol. 2, at 279-80.

[74] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 3(1)(a). The Act appears as an Appendix of this Report.

[75] Draft Act, s. 7(1).

rights of contribution *inter se* as are afforded by statute to tortfeasors. The principles of restitution suggest an affirmative answer, for whether the liability of D1 or D2 to P arises from a tort, a breach of a contract, or a breach of a statutory or fiduciary duty, D1's legally required payment to P will benefit D2 by discharging an obligation that D2 owes to P, thus saving D2 an expense she would otherwise have had to bear. It is difficult to see why the particular type of civil liability discharged should determine whether D2 has thereby been unjustly enriched by retaining, without paying for, the benefit that D1 has incidentally conferred upon her.

(i) The Present Law

It is now quite clear that a person whose liability to the injured person sounds solely in contract cannot rely upon the Ontario *Negligence Act* as the legal source of any right to contribution against another,[76] whether tortfeasor or contract breaker, whose wrongful conduct has also caused the damage for which D1 has compensated P, even though D1's payment will have discharged or *pro tanto* reduced D2's liability to P. This was one of the issues considered by the Supreme Court of Canada in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*[77] In this case, P, the owner of a building, had entered into a contract with D1, a firm of architects and engineers, to design and supervise the construction of a roof. P made another contract with D2, general building contractors, who were to do the work. The roof proved defective, and P sued D1 and D2 for his loss. The trial judge found that the damage had occurred as a result of the carelessness of both D1 and D2, and that, as between the defendants, D2 was 75 percent at fault. However, P failed to recover against D2, because a clause in the contract between P and D2 barred P from making a claim after D1 had issued the final certificate. In addition, D2's guarantee was limited in time, and P sued after the guarantee period had expired. The trial judge, nonetheless, ordered D2 to contribute to D1 for 75 percent of the damages that D1 had been required to pay P. D2's appeal against this part of the judgment was successful.

For present purposes, two aspects of the judgments delivered by the Ontario Court of Appeal and the Supreme Court of Canada are important. First, the Court of Appeal held, by a majority, that D1 and D2 were, *prima facie*, tortfeasors who had damaged the plaintiff as a result of a breach of their common law duty to exercise due care. The fact that there was a contractual relationship between the parties—and one that included a duty of care—did not exclude the possibility of their also being liable in tort.[78]

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[76] See Cheifetz, *supra*, note 49, at 24-26. However, if P could have sued in either tort or contract, D1 will be able to obtain contribution even though P chooses to allege only a breach of contract. See *Aselstine v. McAnally*, *supra*, note 50. One would expect a similar result where D1's liability amounted to both a tort and a breach of trust. Tortious liability based on breach of statutory duty is covered by the *Negligence Act*: *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239.

[77] *Supra*, note 52.

[78] See, also, *Viscount Machine & Tool Ltd. v. Clarke* (1981), 34 O.R. (2d) 752, 126 D.L.R. (3d) 160 (H.C.J.), where a land surveyor's negligence in preparing a plan of survey was

Wilson J.A., in a lengthy dissent, concluded, after reviewing the many authorities, that the parties' liability arose solely from their contractual relationship with the plaintiff. The defendants were not in a position analogous to those exercising a "common calling"; moreover, the "independent tort" test was not satisfied here.[79] Because the Supreme Court held that the expiry of the time limit upon D2's liability to P precluded any possible right of contribution that D1 might otherwise have had against D2, it did not have to decide whether the defendants' liability was tortious or exclusively contractual. Nonetheless, the judgments of the Court of Appeal in *Giffels* indicate how uncertain, and arbitrary, the line can be between tortious and contractual liability.

This observation leads us to the next point to note about *Giffels*, and that is the consequences for rights of contribution that follow from the distinction between tortious and contractual liability. Relying upon earlier authority,[80] Jessup J.A. stated quite categorically that what is now section 2 of the Ontario *Negligence Act* was limited to claims for contribution by *tortfeasors*, and that, had the liability of D1 to P been based solely upon a breach of its contractual duty of care, no statutory right to contribution could have arisen. This was the view of all members of the Ontario Court of Appeal. The Supreme Court did not have to decide this question, although Laskin C.J.C. was inclined to agree with the Court of Appeal on this point.[81]

This interpretation of the scope of the Ontario *Negligence Act*, and similarly worded statutes in other jurisdictions, has been adopted in a majority of decisions in Canada,[82] although authority the other way is not totally lacking.[83] An interesting intermediate position has recently been

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held to be actionable, both as negligence and as a breach of a contractual duty of care. However, the plaintiff's contractual claim was barred because the action was commenced more than 6 years after the defendant was retained; but because less than 6 years had elapsed since the plaintiff sustained the damage, the action in tort was not time-barred.

There is a trend in the case law to regard a breach of an implied contractual duty of care as giving rise concurrently to liability in both tort and contract: see, for example, *John Maryon International Ltd. v. New Brunswick Telephone Co., Ltd.* (1982), 43 N.B.R. (2d) 469, 141 D.L.R. (3d) 193 (C.A.), leave to appeal to the Supreme Court of Canada refused (1982), 43 N.B.R. (2d) 468, 113 A.P.R. 468 (S.C.C.), and *Attorney General of Nova Scotia v. Aza Avramovitch Associates Ltd.* (1984), 63 N.S.R. 181, 11 D.L.R. (4th) 588 (S.C., App. Div.).

[79] *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769.

[80] Particularly *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.).

[81] *Supra*, note 52, at 1354. See, also, *dicta* in *Waterloo County Board of Education v. Mark, Musselman, McIntyre, Coombe* (1982), 35 O.R. (2d) 664 (Master S.C.O.), at 666-67, aff'd (1982), 38 O.R. (2d) 61 (H.C.J.).

[82] See, for example, *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*, [1974] 6 W.W.R. 724 (B.C.C.A.), and *Ma Wai Kay v. McGay Ltd.*, [1979] 5 W.W.R. 279 (Man. Q.B.).

[83] *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1974), 51 D.L.R. (3d) 380, [1975] 2 W.W.R. 97 (B.C.S.C.), varied [1976] 2 W.W.R. 673 (B.C.C.A.). Pointing in the

advanced by Lambert J.A., in a dissenting judgment, when he said of the British Columbia statute:[84]

> [I]t may be that if the word 'fault' in the *Negligence Act* were treated as if it referred either to a breach of an obligation imposed by implication of law or to a breach of an obligation contractually substituted by the parties for an obligation imposed by implication of law, as opposed, in both cases, to an obligation wholly arising under a contract, that would go some way to setting the limits on the application of the *Negligence Act* to breach of contract.

The question appears not to have been decided by an English court, although the Court of Appeal of Northern Ireland has held that a statute that was worded identically to the English Act of 1935 did not provide for contribution between those who had caused loss to P as a result of a breach of their separate contracts.[85]

The inapplicability of the *Negligence Act* to non-tortious wrongdoers, however, does not necessarily exhaust the possibilities for apportioning a single loss among those concurrently liable for it. First, if D1 and D2 are joint contractors, a right to contribution or indemnity may be either expressly provided by a term in their contract or, if the contract is silent, implied by a court. This approach will, of course, be of assistance only if there is a contractual relationship between D1 and D2. In many instances, however, as in *Giffels* itself, D1 and D2 will have entered into separate contracts with P. But even in a case where it is not possible to find an express

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same direction are those cases in which statutory provisions that empower the court to apportion damages between the defendant and a contributorily negligent plaintiff have been interpreted to apply to actions by the plaintiff for breach of contract: *West Coast Finance Ltd. and Booth v. Gunderson, Stokes, Walton & Co.* (1974), 44 D.L.R. (3d) 232, [1974] 2 W.W.R. 428 (B.C.S.C.), varied [1975] 4 W.W.R. 501 (B.C.C.A.); *City of Red Deer v. Canadian Tennis Association Ltd.* (1977), 5 A.R. 330 (S.C., T.D.); and *Truman v. Sparling Real Estate Ltd.* (1977), 3 C.C.L.T. 205 (B.C.S.C.). See, also, the dissenting judgment of Pigeon J. in *Smith v. McInnis*, [1978] 2 S.C.R. 1357, 91 D.L.R. (3d) 190, where his Lordship held that breach of contract was the only proper cause of action available to a client against her negligent solicitor, but that, as in civil law jurisdictions, contributory negligence should be a partial defence.

Australian authorities, on the other hand, have denied that contributory negligence is a partial defence to an action for breach of contract. See, for example, *A.S. James Pty. Ltd. v. C.B. Duncan*, [1970] V.R. 705 (S.C.), and *Harper v. Ashtons Circus Pty. Ltd.*, [1972] 2 N.S.W.L.R. 395 (C.A.). For *dicta* to this effect, see *Mitchell v. Jolly*, [1960] O.R. 470, 25 D.L.R. (2d) 18 (C.A.).

In a recent decision by the Supreme Court of Canada, *Carl B. Potter Ltd. v. The Mercantile Bank of Canada*, [1980] 2 S.C.R. 343, 112 D.L.R. (3d) 88, the Court refused to reduce a beneficiary's damages for the defendant's breach of trust, on the ground that, while "fault" in the Nova Scotia *Contributory Negligence Act*, R.S.N.S. 1967, c. 54, s. 1, might be wider than negligence, it does involve breach of a legal duty. The Court held that there was no authority for the proposition that "a *cestui que trust* owes a duty to its trustee to ensure that the terms of its trust are observed" (at 352).

[84] *Rempel and Rempel v. Parks* (1984), 10 D.L.R. (4th) 52, at 66, [1984] 4 W.W.R. 689 (B.C.C.A.).

[85] *McConnell v. Lynch-Robinson*, [1957] N.I. 70 (C.A.).

or implied contractual right to contribution or indemnity, a court may nonetheless resort to the equitable doctrine of contribution.[86]

Alternatively, a court may apply the common law rule respecting recoupment[87] in favour of a person who is compelled by law to discharge an obligation owed to a third party, which incidentally discharges a separate obligation owed by another, and where, as between the two, the latter is ultimately liable to pay. There is no logical reason why the rules developed for co-debtors should not be equally applicable to those liable to pay a single amount of damages as a result of a breach of their separate contracts. Despite the absence of clear authority to this effect,[88] in *Giffels* Laskin C.J.C. seemed to hint at such a possibility when he said:[89]

> I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue that one and not both as in this case.

The potential of the common law for developing in this direction has been explored by Professor Ernest Weinrib, who has vigorously maintained that separate contract breakers who cause the same loss to the plaintiff do have a non-statutory right to contribution or, where appropriate, indemnity.[90] This position is derived from the restitutionary principles, set out earlier, that underpin those rights of contribution that have already been judicially developed without statutory aid. Professor Weinrib's point may be bolstered by recalling that the principal justification for the refusal of the common law to provide for a right to contribution among tortfeasors, the maxim *ex turpi causa non oritur actio*, is generally inapplicable to those whose only "wrong" is breach of a contractual promise. Moreover, he argues, a court may find in the statutory right to contribution among

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[86] See *supra*, this ch., sec. 2.

[87] *Ibid.*

[88] See, however, *Harries Hall & Kruse v. South Sarnia Properties Ltd.* (1928), 63 O.R. 597, [1929] 2 D.L.R. 821 (App. Div.), where damages were apportioned between concurrent contract breakers.

[89] *Supra*, note 52, at 1355.

[90] Weinrib, "Contribution in a Contractual Setting" (1976), 54 Can. B. Rev. 338, at 339-45. For an opposing view, see Weir, *supra*, note 40, at 240, where the absence of a right to contribution in common law jurisdictions is contrasted with the position in civil law countries.

Further support for an extension of the right to contribution to concurrent contract breakers is given in Morgan, "The Negligent Contract-Breaker" (1980), 58 Can. B. Rev. 299, at 310:

> It is almost indisputable that contribution should be available in such situations. Its absence would be a lonely exception to the general trend of increasing precision in the fixing of responsibility for compensation or restitution when loss is suffered.

tortfeasors a statement of public policy in favour of apportionment, from which, by analogy, to develop apportionment rules in contractual contexts.[91]

If the law appears to be settled that the *Negligence Act* does not confer a right of contribution between those whose only legal wrong is a breach of contract, then it would seem equally clear that the statutory right of contribution does not extend to trustees and other fiduciaries whose non-tortious breach of their equitable obligations exposes them to concurrent liability. However, as we have seen, equity long ago developed contribution rules to apportion the burden of liability for breach of trust among trustees, although these non-statutory rules do not have the same flexibility as the right to contribution created by the *Negligence Act*.[92]

(ii) The Case for Expansion

From the foregoing description of the scope of the right to contribution among tortfeasors and other wrongdoers, two general criticisms of existing law emerge. First, the very reasons that made the rule in *Merryweather v. Nixan*[93] unfair apply with equal force to situations where D1 and D2 are concurrent contract breakers, or where one is a contract breaker and the other a tortfeasor. The absence of a right to contribution allows the injured person to choose the defendant who is to bear the entire loss for which two or more defendants are legally responsible. If the person sued by the plaintiff has no claim to contribution, the other will have obtained a benefit that it is unjust to retain. It has been precisely to avoid this kind of injustice that, in other contexts, equity, the common law, and statutes have provided rights of contribution and indemnity. The particular legal categories into which the primary liabilities of D1 and D2 to P fall ought to be of no relevance to the secondary legal rights and duties arising between D1 and D2.

Secondly, there is ample judicial evidence that the line dividing tortious from contractual liability is notoriously difficult to draw, and that the principles upon which damages are awarded in tort and contract may be moving closer together.[94] There would seem to be little justification for making the distinction determinative of the existence of a contribution claim between those who are liable for causing the same loss to the injured party.

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[91] It may also be noted that the contribution provision in s. 13.18(2) of the draft *Canada Securities Market Act*, *supra*, note 73, is broad enough to cover concurrent breaches of contract that cause a single loss.

[92] See *supra*, note 9, and accompanying text.

[93] *Supra*, note 10.

[94] See Irvine, "Contract and Tort: Troubles Along the Border" (1979), 10 C.C.L.T. 281, and Morgan, *supra*, note 90. That differences remain is illustrated by *Cardinal Construction Ltd. v. The Queen in right of Ontario* (1981), 32 O.R. (2d) 575, 122 D.L.R. 703 (H.C.J.), aff'd 38 O.R. (2d) 161, 128 D.L.R. (3d) 662 (C.A.), where the rule was affirmed that punitive damages will not be awarded for a breach of contract that did not amount to an independent tort.

(iii) Other Jurisdictions

Legislative activity in other jurisdictions both suggests the existence of a widespread dissatisfaction with the existing law and provides a wealth of experience from which the Commission has been able to inform its own proposals. A common feature of these reforms has been to establish, or to propose, a common statutory framework within which to work out contribution claims among concurrent wrongdoers, irrespective of the nature of the primary obligations owed to the injured party by the wrongdoers.

An early, and influential, model is provided by the Irish *Civil Liability Act, 1961*,[95] the provisions of which were drawn in large part from the terms of a draft bill suggested by Professor Glanville Williams.[96] In this statute,[97] a "concurrent wrongdoer" who may make, or be subject to, a contribution claim is defined as a person who has committed

> a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional.

The Act also specifically provides that wrongs are concurrent if they cause the same damage to the injured person, whether they are contemporaneous or successive.[98] Thus, an architect who negligently designs a building or negligently supervises or inspects its construction may be a concurrent wrongdoer with the builder who negligently constructs it, even though their respective wrongs that caused the same damage may not have been committed contemporaneously.

In the United Kingdom, the scope of the application of the *Civil Liability (Contribution) Act 1978*[99] is defined in section 1(1) as follows:

> 1.—(1) Subject to the following provisions of this section, any person *liable in respect of any damage* suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly liable with him or otherwise).

The interpretation section goes on to provide:

> 6.—(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

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[95] *Supra*, note 42.

[96] Williams, *Joint Torts and Contributory Negligence* (1951), ch. 22.

[97] *Supra*, note 42, s. 2(1).

[98] *Ibid.*, s. 11(2)(c).

[99] *Supra*, note 61.

For our purposes, there are two limitations upon the scope of the right to contribution created by the English statute that should be noted. First, by limiting contribution claims to the defendant's liability in respect of any *damage* suffered by the injured person, the Act excludes any claims that may arise between concurrent *debtors*, whether jointly or severally liable in the same sum to the plaintiff.[100] Accordingly, any right to contribution arising from the discharge of a debt continues to be governed by the non-statutory law relating to contribution, indemnity, and subrogation. The Report of the English Law Commission, on which the 1978 Act is largely based, limited its recommendations for reform in this way, on the ground that the law was generally satisfactory in those areas.[101] The Act, therefore, does not apply to an indemnity insurer's right to be subrogated to the rights of the assured, nor to a surety's right to be subrogated to the rights of the creditor against the principal debtor, nor to a claim to contribution by co-sureties, nor to maritime general average. It may be noted that the Report of the Alberta Institute of Law Research and Reform did not directly address this issue, although by limiting the scope of its recommendations to "wrongdoers",[102] it may be taken to have intended to follow the English statute on this point.

The second limitation upon the statutory right to contribution contained in the English *Civil Liability (Contribution) Act 1978* is that the Act does not affect either an express contractual provision made by the parties that regulates or excludes contribution, or an express or implied contractual or other right to indemnity.[103]

The *Uniform Contributory Fault Act*,[104] adopted by the Uniform Law Conference of Canada, has endorsed the recommendation of the Alberta Institute of Law Research and Reform[105] that contribution among wrongdoers should be extended beyond tortfeasors to include concurrent contract breakers and those who have breached a statutory duty. The Act does not apply, however, to a breach of trust: the Alberta Institute's Report stated that this matter should be dealt with in connection with a reform of the *Trustee Act*.[106]

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[100] However, the Act extends the abolition of the judgment bar rule to joint liability for *debt or damage* (s. 3).

[101] The Law Commission, *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977) (hereinafter referred to as "Law Commission Report"), esp. para. 29, at 8-9.

[102] *Supra*, note 65, at 36, Recommendation 8.

[103] *Supra*, note 61, s. 7. See, further, *infra*, this ch., sec. 3(c).

[104] *Supra*, note 66, s. 1(c).

[105] *Supra*, note 65, at 51, Recommendation 10. See *ibid*., at 40-51, where the issue is discussed by the Institute.

[106] See *ibid*., at 52, where the Institute decided to defer consideration of this matter to a later report on the law of trusts.

(iv) Conclusions

a. Concurrent Wrongdoers

There are, no doubt, a number of problems, some quite difficult, that are likely to arise if the right of contribution is extended by statute to all concurrent wrongdoers, irrespective of the kind of liability owed to the injured person. It would be important to decide, for example, how rights of contribution should be affected by contractual limitation periods, exemption and limited liability clauses, and the possibly differing availability of the partial defence of contributory negligence to actions for breach of contract and tort. Professor Weinrib regarded complexities of this kind as so formidable that he urged that statutory provision should not be made for contribution among non-tortious wrongdoers:[107]

> Where one can envisage many variations in the kinds of contractual relationships and in their terms, the difficulties would best be solved by the kind of case-by-case elaboration which is the common law's vaunted strength.

Despite this warning, the Commission has concluded that statutory reform is both desirable and necessary. Even if there already exists a right to contribution among concurrent wrongdoers who are not tortfeasors, the state of doctrinal development is, at best, uncertain. The virtual absence of any cases in which a court has applied general restitutionary principles to give relief is likely to mean that the law in this rather difficult and technical area will evolve slowly and piecemeal. Moreover, it is highly probable that anomalies will emerge respecting the statutory rights available to concurrent tortfeasors, those rights previously recommended by the Commission for contribution among trustees,[108] and the common law and equitable rights of other wrongdoers. The alarmingly large number of recent cases in which our courts have experienced difficulties in their application of restitutionary principles[109] provides cogent evidence against the view that legislatures should abstain in this area. Moreover, there appears to be very little evidence upon which to base an assumption that the courts will use the principles embodied in the *Negligence Act* as a springboard for extension into areas with which it does not expressly deal.

Accordingly, the Commission, like law reform bodies in England, South Australia, Victoria, New Zealand, and Hong Kong, has decided to recommend that there should be a right to contribution not only among all concurrent tortfeasors, as previously recommended, but among all concurrent wrongdoers, whatever the legal nature of their liability to the injured person.[110] As in the case of tortious conduct, we further recommend that the

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[107] Weinrib, *supra*, note 90, at 342.

[108] Ontario Law Reform Commission, *Report on the Law of Trusts*, *supra*, note 9, Vol. II, ch. 6.

[109] See Weinrib, *supra*, note 90, at 343.

[110] Draft Act, s. 3(1).

criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant include a penal or punitive element, should not automatically bar a right of contribution.[111] We wish to emphasize our view that the uncertainties in the present law, the practical importance of clarity in this area, the difficulties experienced by the courts in assembling a coherent set of legal rules on a case-by-case basis from the somewhat abstract restitutionary principle of unjust enrichment, and the likelihood that discrepancies will emerge between the statutory rights of tortfeasors and the non-statutory rights of other wrongdoers, make a legislative solution attractive in Ontario, as, indeed, they have in other jurisdictions. It is by no means obvious that the varieties of contract will provide more insuperable barriers to appropriate statutory reforms than the varieties of torts.

b. Concurrent Debtors

Having decided to recommend enlarging the scope of contribution beyond tortfeasors, the next question is whether it should include only those whose civil liability depends upon a concurrent *wrong*, as opposed to a *debt*. The Irish and English legislation has, as we have seen, been limited in this way. The *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada, like the proposals of the Alberta Institute of Law Research and Reform, is similarly confined.

We also have concluded, and accordingly recommend, that the proposed statutory right to contribution should not extend to those liable for a debt.[112] While it is difficult to justify in principle an assertion that there is some fundamental distinction between apportioning, as between themselves, the liability of wrongdoers and debtors, two practical considerations support this limitation. First, there appears to be no significant dissatisfaction with the present law respecting the existing rights to contribution among those who owe debts to another. Although cases on guarantees appear quite regularly in the law reports, the contentious issues do not seem to relate to questions of contribution or indemnification. Secondly, the omission of contribution among concurrent debtors avoids overburdening proposals for law reform in an area that already contains a fair share of complexity.

In most cases, there will be no difficulty in distinguishing a claim for damages[113] that arises as a result of a civil wrong, which is capable of giving rise to a statutory right of contribution, from a claim for a debt, for which the

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[111] *Ibid.*, s. 7(1).

[112] See *ibid.*, s. 3, which effectively precludes a statutory right to contribution from arising where the liability is for a debt.

[113] We recommend that liability to restore a chattel to the injured party should, for this purpose, be regarded as equivalent to liability to pay damages. Thus, a person who returns to the rightful owner a chattel, which that person has purchased from someone

parties must resort to the common law or equity for an apportionment of liability among the concurrent debtors. A debt is a right to be paid a sum certain in particular circumstances, whereas the victim of a civil wrong will generally sue for an unliquidated amount of damages as compensation for the wrong suffered. Parties to a contract are free to predetermine the amount payable in the event of breach, subject to the equitable doctrine of penalties.[114] A person whose liability has been effectively regulated by a liquidated damages clause would be potentially able to assert, or to be liable to, the Commission's proposed statutory right of contribution, because the liability remains one for damages arising from a breach of contract.

(c) Existing Rights of Contribution and Indemnity

The critical issue to be considered in this section is the effect that the Commission's proposed new statutory right of contribution should have upon any other right to contribution or indemnity[115] that the parties may already have at common law, by statute, by virtue of either an express or implied contractual arrangement made between them, or as a result of any other legal obligation.[116]

Section 2 of the *Negligence Act* provides, in part, that concurrent tortfeasors are liable to pay contribution or indemnity in proportion to their respective degrees of fault or negligence "in the absence of any contract

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who had no authority to sell it, should be able to claim contribution from others whom the owner could have sued in conversion.

We further recommend that other decrees of specific relief that discharge or reduce the liability of a concurrent wrongdoer should be capable of founding a claim for contribution. See Draft Act, s. 9(7).

[114] In the Commission's *Report on Amendment of the Law of Contract* (1987), at 147, the Commission recommended that agreements to pay a stipulated sum on a breach of contract should be governed by statutorily enacted principles of unconscionability, rather than the doctrine of penalties.

[115] It bears re-emphasizing the distinction made in this Report between "contribution" and "indemnity". The term "contribution" has been used by the Commission to refer to a case where one concurrent wrongdoer (D1), who has paid all, or more than his proportionate share, of the injured person's damages, seeks payment from another concurrent wrongdoer (D2) of the amount that exceeds D1's proportionate share. The determination of contribution claims is based, at present, on comparative fault or negligence as between the concurrent wrongdoers.

The term "indemnity", on the other hand, has been used in this Report to refer to the case where two persons are liable for the same debt or damages, but the liability of one is primary and the liability of the other is secondary. The determination of indemnity claims is based not on comparative fault or negligence, but on the nature of the relationship between the parties.

For a more detailed discussion of this distinction, see *supra*, ch. 1.

[116] Concerning the applicability of the proposed new Act in the context of apportionment rights as between a plaintiff and a defendant, see *infra*, ch. 10, sec. 9.

express or implied". A contrary or different contractual arrangement respecting contribution or indemnity therefore supersedes the statutory scheme.

Even where a contract does not expressly provide for a right of contribution or indemnity, such a right may be implied from the nature of the relationship. Thus, in *Lister v. Romford Ice and Cold Storage Co. Ltd.*,[117] the plaintiff-employer relied not only upon statutory rights, but also upon an implied term of the contract to be indemnified by an employee whose negligence had rendered the plaintiff vicariously liable to a third party. In *McFee v. Joss*,[118] a pre-*Negligence Act* decision, the Ontario Court of Appeal held that a contract for the hire of a car should be construed to include an implied contractual right in the owner to be indemnified by the hirer for any liability incurred by the owner as a result of the hirer's negligence.

The right to indemnity may arise not only from an express or implied contractual provision, but also at common law, where the parties are not in a contractual relationship. For instance, if D1 and D2 are subject to a common demand from P, and a payment to P by D1 thereby discharges the liability of D1 and D2, D1 is entitled to be indemnified by D2 if, as between them, D2 was primarily responsible for the payment.[119] Older cases described D1's action for money paid to the use of D2 as based on an implied contract, or quasi-contract, even where there was no contractual relationship between D1 and D2. Today, one would expect a court to characterize D2's liability to indemnify D1 as being a restitutionary obligation imposed by operation of law, rather than one stemming from a fictional, implied contract. In other situations, a wrongdoer may be legally required to indemnify another who was concurrently liable to a third party where the legal duty has never been regarded as resting on notions of contract at all. One example is the right of a trustee to be indemnified in some circumstances by a co-trustee whom the beneficiary could have sued for breach of trust.

Finally, there exists in Ontario a number of statutory provisions dealing with rights of contribution or indemnity, or, in several instances, both. In some cases, such as the *Dog Owners' Liability Act*,[120] for example, the very brief legislation simply permits "contribution and indemnity" in more or less general terms. In other cases, however, particularly the *Environmental Protection Act*,[121] the legislation is relatively comprehensive.

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[117] *Supra*, note 37.

[118] (1925), 56 O.L.R. 578, [1925] 2 D.L.R. 1059 (App. Div.).

[119] See *Moule v. Garrett*, *supra*, note 18.

[120] *Supra*, note 56, s. 2(4).

[121] R.S.O. 1980, c. 141, s. 87.

In connection with statutory enactments providing for a right of contribution or indemnity, mention should also be made of the proposals in the Commission's *Report on the Law of Trusts*.[122] In that Report, we offered recommendations concerning several aspects of the law in this area. We also considered, and rejected, the United Kingdom approach, which would have the effect of placing the Commission's proposed trustee contribution provisions in a single Act dealing with contribution among all classes of wrongdoers, including trustees. Rather, we endorsed the approach of the Alberta Institute of Law Research and Reform and recommended that the proposed new provisions dealing with contribution and indemnity among trustees should be incorporated in the Commission's revised *Trustee Act*.[123] However, it does bear emphasizing that the proposed trustee provisions do not, in fact, form a comprehensive statutory code governing contribution and indemnity between co-trustees. They were intended to effect changes only in certain areas; for example, the legislation would provide for a new test for allocation of liability as between trustees in breach of trust and would abolish a trustee's common law right to indemnity from another trustee.

In its 1977 Report on contribution, the English Law Commission recommended a number of statutory changes to existing law, but proposed that "rights of contribution and indemnity founded in contract or quasi-contract should, for the most part, continue to be regulated by the common law".[124] The subsequent United Kingdom *Civil Liability (Contribution) Act 1978*,[125] which is based largely on the work of the English Law Commission, contains a section that deals specifically with the application of that Act, and, more particularly, with the effect of the Act on existing contractual and other rights of contribution and indemnity. Section 7(3) provides as follows:

> 7.—(3) The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect—
>
> (a) any express or implied contractual or other right to indemnity; or
>
> (b) any express contractual provision regulating or excluding contribution;
>
> which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart this Act).

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[122] *Supra*, note 9, Vol. II, ch. 6.

[123] For a discussion of this question, see *ibid.*, at 382-83.

[124] *Supra*, note 101, para. 80(a), at 23. See, also, *ibid.*, paras. 26-29, at 7-9, and The Law Commission, *Contribution*, Working Paper No. 59 (1975), paras. 15-23, at 9-14, and para. 45(b), at 26.

[125] *Supra*, note 61.

This Commission has come to the conclusion and, accordingly, recommends that, subject to the exceptions discussed below, the contribution provisions of the proposed new *Contribution and Comparative Fault Act* should govern in all cases and, therefore, should supersede any other right to contribution (as distinct from indemnity), whether that right arises by statute or by any other means (including common law and equity).[126]

The Commission believes that, as a general principle, the proposed new Act represents an equitable and workable statutory scheme of contribution that ought to be made applicable to all cases of concurrent wrongdoing. However, as indicated above, we do appreciate that certain exceptions should be made to the otherwise universal scope of our Act.

We turn first to consider the applicability of other statutes that may deal with rights of contribution. In this connection, the Commission recommends that the proposed *Contribution and Comparative Fault Act* ought to supersede all other statutory rights of contribution, as proposed above, unless it is specifically provided in the other statute that the contribution provisions of that statute apply notwithstanding the provisions in the *Contribution and Comparative Fault Act*.[127] This exception to our general proposal means that, should our proposed legislation be enacted, those governmental officials responsible for the administration of other relevant Acts should review those Acts in light of the new *Contribution and Comparative Fault Act* in order to determine whether the provisions in such Acts ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*, and we so recommend. We further recommend that the proposed review of existing legislation should include a consideration of the precise meaning of any provisions concerning the right to "indemnity", having regard to the distinction made in this Report between "contribution" and "indemnity" and the not infrequent use of the latter term in two different ways in the legislation of Ontario.

The second exception to the proposed general rule relating to the applicability of our new Act concerns contribution and indemnity between co-trustees and other fiduciaries. With respect to trustees, we wish to re-emphasize our view that, in certain particulars at least, this area of the law manifests unique characteristics that should be dealt with in a separate and distinct manner. As indicated earlier, it is for this reason that, in our *Report on the Law of Trusts*, the Commission recommended the incorporation of the proposed new contribution and indemnity provisions in respect of trustees into the Commission's proposed *Trustee Act*, rather than into a more general statute governing contribution among wrongdoers. The Commission sees no reason to depart from its earlier views on this matter. Accordingly, we recommend that the contribution provisions of the new *Contribution and Comparative Fault Act* should apply in the case of trustees and other fiduciaries, except as otherwise specifically provided by the

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[126] Draft Act, s. 23(1).

[127] *Ibid*.

proposed *Trustee Act*.[128] Unlike the case of statutory enactments other than the proposed *Trustee Act*—where we have recommended that the new legislation should govern unless the other statutes expressly state, by means of a *non obstante* clause, that it does not—we believe that the special, although limited, contribution provisions of the proposed *Trustee Act* ought to supersede the new *Contribution and Comparative Fault Act* without the requirement of inserting in the proposed *Trustee Act* an express *non obstante* clause.

The third exception pertains to the relationship between the proposed contribution legislation and the *Workers' Compensation Act*.[129] In chapter 6 of this Report, the Commission will consider the comprehensive compensation scheme set forth in that Act. Our conclusion is that nothing in the Commission's *Contribution and Comparative Fault Act* should affect the scheme established under the *Workers' Compensation Act*.[130]

The fourth exception to the general rule relates to contractual provisions dealing with the right to contribution. As we have seen, section 2 of the *Negligence Act* provides for liability to pay contribution on the basis of comparative fault or negligence "in the absence of any contract express or implied". The Commission is of the view that concurrent wrongdoers should continue to have the right to establish their own regime governing rights of contribution as between themselves. Accordingly, we recommend that the provisions of the proposed new *Contribution and Comparative Fault Act* governing contribution should be subject to any express or implied contractual agreement relating to contribution made by the concurrent wrongdoers.[131]

We turn now to existing rights to indemnity—as narrowly defined in this Report—arising between two persons, one of whom is primarily liable for the debt or damages, the other of whom is secondarily liable. In connection with a right to indemnity arising from contract, whether express or implied, the Commission takes the same position as it did with respect to express or implied contractual provisions concerning contribution; that is, we believe that concurrent wrongdoers ought to be able to regulate their own affairs by an agreement made between themselves. Moreover, like the 1978 United Kingdom Act, we would not have our proposed *Contribution and Comparative Fault Act* affect any non-contractual right to indemnity, whether that right arises by statute or at common law. Accordingly, we recommend that the proposed legislation should not affect any express or implied contractual or other right to indemnity.[132] However, we should

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[128] *Ibid.*, s. 3(1)(d).

[129] R.S.O. 1980, c. 539.

[130] See *infra*, ch. 6, sec. 3(d)(ii)b. See Draft Act, s. 23(2).

[131] *Ibid.*, s. 7(3).

[132] *Ibid.*

stress again that, bearing in mind the distinction made in this Report between contribution and indemnity, we do not intend by the preceding recommendation to curtail the power of a court determining a contribution claim to conclude that, in an appropriate case, the claimant is entitled to contribution of 100 percent or to no contribution at all.

Finally, we wish to deal with the situation where D1 seeks contribution from D2, who, in turn, is entitled to be indemnified by D1 for the damages in respect of which contribution is sought.

As we have seen, section 7(3)(a) of the English *Civil Liability (Contribution) Act 1978*, as well as the analogous provision in the Commission's proposed legislation,[133] provides that nothing in the Act shall "affect" any express or implied contractual or other right to indemnity. It may be argued that, as a result of such a provision, a wrongdoer who is obliged, quite apart from this Act, to indemnify another, cannot seek contribution under the Act, since to do so would "affect" the existing right to an indemnity. Nevertheless, we do not consider the matter to be free from doubt. The wording of section 3(3) of the draft contribution Bill appended to the English Law Commission Report—a section that reproduced a provision in section 6(1)(c) of the 1935 United Kingdom Act—was clearer, since it provided expressly that "[n]o person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought", a provision that the Alberta Institute has supported.[134] The Canadian *Uniform Contributory Fault Act* also contains a section to this effect.[135]

The Commission endorses the type of legislation just described. Accordingly, we recommend that the Commission's proposed legislation should provide specifically that no person should be entitled to claim contribution from a person who is entitled to be indemnified by the claimant for the damages in respect of which contribution is sought.[136]

We believe that the proposals recommended above concerning the application of the Commission's proposed new *Contribution and Comparative Fault Act* strike a practical and appropriate balance between, on the one hand, producing a uniform statutory scheme of contribution applicable to all concurrent wrongdoers, and, on the other hand, protecting both the express or implied contractual arrangements made by wrongdoers for the regulation of contribution rights as between themselves and any rights to indemnity that arise by law in particular situations.

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[133] *Ibid.*

[134] Law Commission Report, *supra*, note 101, at 34, and Alberta Report, *supra*, note 65, at 81, Recommendation 20. See *ibid.*, at 79-81, for a discussion of this issue.

[135] *Supra*, note 66, s. 10.

[136] Draft Act, s. 7(3).

(d) Remedies Available to the Claimant for Contribution

Normally, a person entitled to contribution from a concurrent wrongdoer will be entitled to judgment in which the person who is liable to contribute is ordered to pay to the claimant a sum that represents the contributor's fair portion of the total liability to the injured party. The principles upon which the apportionment between them is made are considered in a later chapter of this Report.[137]

However, this may not exhaust the possibilities, especially if the right to contribution is extended beyond concurrent tortfeasors. Suppose, for example, that D1 has been held liable to P, and that D2, who has broken a contract with P that has also contributed to P's loss, is insolvent. D2, however, had been required by P to deposit a security for due performance of D2's contract. Would it not be just that D1 should have the benefit of that security up to the amount of the sum that it was found appropriate for D2 to contribute? This would not work hardship on D2's unsecured creditors, whether D2 had become indebted to them before or after D2 contracted with P. D1 is simply availing herself, in part, of the security to which P would have been entitled if P had chosen to press her claim against D2, rather than D1.

Nor, it should be noted, is it any objection that the effect of D1's payment is to discharge D2's liability. Sureties are in exactly the same position when they discharge the principal debt, and are entitled to be subrogated to any security deposited by the debtor with the creditor. Moreover, the surety who pays the debt is also entitled to the benefit of any security given by a co-surety to the creditor, and thus herself becomes secured up to the limit of the sum to which she is entitled by way of contribution. Of course, if P still has a claim against D2, P's interest in the security should rank ahead of D1's.

Finally, it also seems appropriate that the claimant for contribution should enjoy any personal priority that the injured person would have had over the general unsecured creditors of D2. This will tend to limit the adverse consequences for D1 of P's decision to sue D1 alone. D2's creditors will be in exactly the same position they would have occupied if D2 had been required to pay to P an amount equal to D2's due share of responsibility for P's loss. Because P's claim against D2 is extinguished by D1's payment, the analogy of the insurer's right to be subrogated to the personal rights of the assured against third parties is inappropriate. However, if in principle it seems fair to give D1 this advantage, there is a technical explanation for the result, namely, that on D1's payment, P's rights against D2 are fictionally assigned to D1.

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[137] See *infra*, ch. 8.

The Commission has come to the conclusion and, therefore, recommends that a person who has a right to contribution under the proposed *Contribution and Comparative Fault Act* should be subrogated to any right that the injured person has against the concurrent wrongdoer from whom contribution is claimed.[138]

(e) Binding the Crown

The Commission recommends that the proposed new statutory provisions for contribution among concurrent wrongdoers should expressly apply to the Crown in the right of Ontario and, insofar as it is constitutionally permissible, to the Crown in the right of Canada.[139]

Recommendations

The Commission makes the following recommendations:

1. (1) Subject to the following recommendations, a right to contribution should be capable of arising among wrongdoers who cause a single loss to an injured person, irrespective of the nature of the legal obligation that gives rise to their liability in damages, and of the form of the relief that the wrongdoer has been required to provide to the injured party.

   (2) The criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant include a penal or punitive element, should not automatically bar a right of contribution. (See, also, chapter 8, Recommendation 7(4).)

   (3) For the purpose of this recommendation, liability to restore a chattel to the injured party should be regarded as equivalent to liability to pay damages. In addition, other decrees of specific relief that discharge or reduce the liability of a concurrent wrongdoer should be capable of founding a claim for contribution.

2. The proposed statutory right should not extend to those liable for a debt.

3. (1) Subject to the exceptions recommended below, the contribution provisions of the proposed new *Contribution and Comparative Fault Act* should govern in all cases and, therefore, should supersede any other right to contribution (as distinct from indemnity), whether that right arises by statute or by any other means (including common law and equity).

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[138] Draft Act, s. 7(2).

[139] *Ibid.*, s. 20.

(2) (a) The proposed *Contribution and Comparative Fault Act* ought to supersede all other statutory rights of contribution, as recommended in paragraph (1), unless it is specifically provided in the other statute that the contribution provisions of that statute apply notwithstanding the provisions in the *Contribution and Comparative Fault Act*.

(b) Should the proposed legislation be enacted, those governmental officials responsible for the administration of other relevant Acts should review those Acts in light of the new *Contribution and Comparative Fault Act* in order to determine whether the provisions in such Acts ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*.

(c) The proposed review of existing legislation should include a consideration of the precise meaning of any provisions concerning the right to "indemnity", having regard to the distinction, made in chapter 1 of this Report, between "contribution" and "indemnity" and the not infrequent use of the latter term in two different ways in the legislation of Ontario.

(3) The contribution provisions of the new *Contribution and Comparative Fault Act* should apply in the case of trustees and other fiduciaries, except as otherwise specifically provided by the revised *Trustee Act* proposed by the Commission in its *Report on the Law of Trusts* (1984).

(4) The provisions of the proposed new *Contribution and Comparative Fault Act* governing contribution should be subject to any express or implied contractual agreement relating to contribution made by the concurrent wrongdoers.

4. The proposed legislation should not affect any express or implied contractual or other right to indemnity, as defined in chapter 1 of the Report.

5. No person should be able to claim contribution from a person who is entitled to be indemnified by the claimant for the damages in respect of which contribution is sought.

6. A person who has a right to contribution under the proposed *Contribution and Comparative Fault Act* should be subrogated to any right that the injured person has against the concurrent wrongdoer from whom contribution is claimed.

7. The proposed new statutory provisions for contribution among wrongdoers should expressly apply to the Crown in right of Ontario and, insofar as it is constitutionally permissible, to the Crown in right of Canada.

CHAPTER 5

SETTLEMENTS AND CONTRIBUTION CLAIMS

1. INTRODUCTION

This chapter examines a number of difficult issues concerning rights of contribution and settlements. The first question is whether a right of contribution should be granted in favour of a person who has settled with the injured person. If an affirmative answer is given to this question, then it is necessary to consider whether it should be a defence for the person from whom contribution is claimed (D2) to establish that the claimant (D1) was not in fact liable to the injured person (P), but mistakenly settled or compromised P's claim. It should be noted that D2 may resist the contribution claim on the ground that he had a total or partial defence to any claim. The more general question of the relevance to the success of a contribution claim of the fact that D2 was never, or has ceased to be, liable to P is considered in chapters 6 and 7.

Finally, this chapter considers contribution issues arising out of a partial settlement between P and D1.

2. THE PRESENT LAW

Until recently, Ontario was one of the few jurisdictions that had specifically provided by statute for claims for contribution or indemnity to be made following a settlement by one tortfeasor with the injured person. Elsewhere, courts have had to imply a right in favour of a person who had compensated the plaintiff without being sued to judgment.[1] The relevant provision of the Ontario *Negligence Act*,[2] section 3, states:

> 3. A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such

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[1] See, for example, *Stott v. West Yorkshire Road Car Co. Ltd.*, [1971] 2 Q.B. 651 (C.A.), where the Court allowed an appeal on the ground that the wording in the *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30 (U.K.), s. 6(1)(a), which conferred a right to contribution upon "any tortfeasor *liable* in respect of that damage..." should not be restricted to those *held liable* in litigation, but could include a tortfeasor who had settled the injured person's claim.

[2] *Negligence Act*, R.S.O. 1980, c. 315.

other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

The case law produced by this section is comparatively small.[3] This fact is presumably an indication that the section works reasonably smoothly, although the absence of litigation does not necessarily speak to the effectiveness of the section in encouraging fair settlements of claims made by those who have been injured by the tortious conduct of others. The language of section 3 makes it plain that it does not extend to those whose conduct is not tortious, but amounts only to a breach of contract or of a fiduciary duty: subject to an exception discussed below, contribution may be claimed only by and from tortfeasors whose conduct has concurrently caused a loss to the injured person. Whether section 3 extends to all tortfeasors, whatever the [illegible] of the particular tort, depends on the considerations that were canvassed in chapter 4.

A distinctive feature of section 3 is that it enables a tortfeasor who has made a settlement with the injured person to institute an independent action for contribution; tortfeasors who have been successfully sued by the injured person normally may not institute an independent claim for contribution, but are required to vindicate their right to contribution by serving a third party notice upon any person from whom contribution is sought to be recovered.[4] The section provides that a tortfeasor who has settled may commence an action for contribution against other tortfeasors. The section also provides that a settling tortfeasor may continue such an action, which suggests that an action for contribution may be instituted before the settlement has been made.[5]

The fact that different procedural consequences depend upon whether the claimant settled with, or was sued by, the injured person may require a sharp distinction to be made between a settlement and a judgment. It has been held that the procedure provided by section 3 can be used by a person who has been successfully sued in a foreign jurisdiction whose law did not permit contribution to be claimed against a concurrent tortfeasor.[6] It might be expected that a similar result would be reached where, as a result of the constitutionally limited jurisdiction of the Federal Court of Canada, it is not

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[3] It is comprehensively reviewed in Cheifetz, *Apportionment of Fault in Tort* (1981), ch. 2.

[4] *Cohen v. S. McCord & Co. Ltd.*, [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.). For further discussion of this rule and other procedural aspects of contribution claims, see chapter 9 of this Report.

[5] See *Glass v. Avenue Dodge Chrysler* (1979), 26 O.R. (2d) 592, 10 C.C.L.T. 69 (Co. Ct.), where it was held that proceedings could be instituted under s. 3 at a time when the claimant for contribution was still a defendant in an action commenced by the injured party, but which was settled soon thereafter.

[6] *Kraft v. The Queen in right of the Province of Ontario*, [1972] 3 O.R. 684, 29 D.L.R. (3d) 275 (H.C.J.).

possible for a defendant who has been sued in that Court to serve a third party notice upon a concurrent tortfeasor.[7] The term "settlement" may also include settlements the terms of which are incorporated into a judgment,[8] and the acceptance of money paid into a court by one of the parties to the litigation.[9]

It is clear that a settlement that extinguishes the liability of concurrent wrongdoers enables the settling tortfeasor to claim contribution under section 3.[10] Despite the apparent absence of authority on the point, the wording of section 3 does not suggest that it is not equally applicable to partial settlements, so that a tortfeasor who has settled, without barring the injured person's claim against other concurrent tortfeasors, is also entitled to contribution, at least in respect of any sum paid over and above his fair share of the total liability.[11]

A significant extension of the categories of persons eligible to claim contribution beyond those who are strictly speaking "tort feasors" has been made in the context of section 3. In *Marschler v. G. Masser's Garage*,[12] the owner of a truck (D1) settled the claim of a person with whom he had collided (P); D1 subsequently instituted proceedings for contribution against D2, who had negligently failed to repair the brakes of D1's truck. It was held that D2 was solely liable for P's injury. Nonetheless, Lebel J. held that D1 was entitled to an indemnity from D2 by virtue of section 3, even though D1 was not a tortfeasor whom P could have successfully sued for his injury. The learned judge was prepared to give a generous interpretation to the term "tort feasor", so as to include "a person who impliedly assumes or admits liability when he enters into a settlement".[13]

The virtue of this interpretation is that it encourages those against whom claims are made to settle; the possibility that, whether or not they could be successfully sued by the injured person, they may be able to shift some or all of the amount paid under the settlement to a party who was liable for the damage provides an obvious incentive to avoiding the hazards,

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[7] See *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, (1979), 106 D.L.R. (3d) 193. But see the discussion *supra*, ch. 2, note 97.

[8] *Morello v. Henderson*, [1959] O.W.N. 121 (H.C.J.).

[9] *Reaney v. National Trust Co.*, [1964] 1 O.R. 461, 42 D.L.R. (2d) 703 (H.C.J.). This will presumably also hold true under the provisions for offers of settlement under R. 49 of the current Rules of Civil Procedure, O. Reg. 560/84.

[10] *Nesbitt v. Beattie*, [1955] O.R. 111, [1955] 2 D.L.R. 91 (C.A.).

[11] In *Dixon and Dixon v. The Queen in right of British Columbia and British Columbia Hydro and Power Authority* (1979), 99 D.L.R. (3d) 652, [1979] 4 W.W.R. 289 (B.C.S.C.), aff'd (1980), 128 D.L.R. (3d) 389 (B.C.C.A.), D1 settled with P on the eve of the trial in which D1 and D2 were co-defendants. Although third party proceedings by D2 against D1 were adjourned, the Court gave no indication that they could not be sustained because D1 had made a partial settlement with P.

[12] [1956] O.R. 328, 2 D.L.R. (2d) 484 (H.C.J.) (subsequent reference is to 2 D.L.R. (2d)).

[13] *Ibid.*, at 490.

delays, and costs of litigation. Nonetheless, in some other jurisdictions courts have taken a narrower view of the circumstances in which a claim for contribution can be made. For instance, in *Baylis v. Waugh*,[14] D1 made a payment into court, while at the same time denying his liability to P. P accepted the payment in, and D1 claimed contribution from D2. The New Zealand Court held that it was open to D2 to defend this claim by showing, not only that he had a defence to P's claim, but also that D1 had. In the English Court of Appeal, Lord Denning M.R. has also stated, in *Stott v. West Yorkshire Road Car Co. Ltd.*,[15] that in order to claim contribution D1 must have been sued to judgment by P, or admitted liability to P. If he made a settlement with P without admitting liability, contribution could only be claimed if, in the course of the proceeding in which contribution was claimed, D1 were to establish or admit his liability to P.[16] This view has recently been reaffirmed in the English Court of Appeal, where Donaldson L.J. stated that a person who settles in the mistaken belief that he is liable for the damage cannot claim contribution, because the *Law Reform (Married Women and Tortfeasors) Act, 1935*[17] confined the right to tortfeasors.[18]

It may be possible to reconcile the decision in *Marschler* with the statements in these English cases: the wording of the English and the Ontario statutes differed,[19] and in any event Lebel J. found that D1 had, in the circumstances in which the settlement was made, admitted or implicitly assumed liability for P's injury. In a recent decision, however, an Alberta Court has expressed a clear preference for *Marschler* over Lord Denning's *dicta* in *Stott*. In this case, *Hannigan v. City of Edmonton*,[20] the plaintiff

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[14] [1962] N.Z.L.R. 44 (S.C.).

[15] *Supra*, note 1.

[16] *Ibid.*, at 657. Salmon L.J. agreed with Denning M.R. He held that D1's statement that it had settled "without admitting liability" did not preclude it from claiming contribution, since the mere fact of settlement indicated a belief in liability. However, Salmon L.J. said that if D1 had paid P without any liability to do so, "there could, in no event, be any liability upon [D2]" (*ibid.*, at 659).

Megaw L.J. expressed a similar view when he stated: "No doubt if the alleged joint tortfeasor [D2] does not admit the existence of liability on the part of the defendant [D1] towards the plaintiff [P] on grounds either of fact or law, the defendant must establish the existence of such liability towards the plaintiff as a condition of establishing his claim to contribution from the alleged joint tortfeasor [D2]" (*ibid.*, at 660).

[17] *Supra*, note 1.

[18] *Acrecrest Ltd. v. W.S. Hattrell & Partners*, [1983] Q.B. 260, at 280, [1983] 1 All E.R. 17 (C.A.), overruled on other grounds by *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1985] 1 A.C. 210, [1984] 3 W.L.R. 953 (H.L.).

[19] In particular, s. 3 of the *Negligence Act*, *supra*, note 2, refers to the claimant for contribution simply as a "tort feasor", whereas the English statute spoke of the claimant as a "tortfeasor *liable* in respect of that damage". It should also be noted that prior to *Stott*, *supra*, note 1, it was unclear whether a person who had not been sued to judgment could *ever* be aptly described as a tortfeasor who was *liable* for the injured person's loss, even if he had admitted liability in an out-of-court settlement.

[20] (1983), 1 D.L.R. (4th) 397, [1983] 6 W.W.R. 644 (Alta. Q.B.).

sued the city for damages sustained by his vehicle when he drove it into the vehicle of a third party in order to avoid a bus owned by the city. The plaintiff included in his claim for damages the amount that he had paid to the third party in settlement of the latter's claim for the damage caused to his vehicle by the plaintiff. The city admitted that it was solely liable for the damage caused to the plaintiff and the third party; it resisted the plaintiff's claim to be indemnified against the third party on the ground that the plaintiff was not "a tortfeasor" in respect of the third party. The Court held that this was not a defence to the plaintiff's claim for indemnity: any other view would unduly discourage settlements. The decision in *Marschler* was followed and, relying upon the judgment of Salmon L.J. in *Stott*,[21] the learned judge held that a person who settled a claim made by an injured person would be denied contribution only if he thought that there was no chance of his being held liable for the injured person's loss.

As indicated, section 3 of the *Negligence Act* does not distinguish between a settlement that has the effect of protecting other concurrent wrongdoers from any claim against them by the injured person in respect of the loss to which the settlement related, and a settlement by one wrongdoer that keeps alive the possibility of an action by the injured person against others who are concurrently liable for his injury. A settlement between the injured person and one concurrent wrongdoer could bar a claim by the injured person against other concurrent wrongdoers if the terms of the settlement expressly released the liability of others for the loss to which the settlement related, or if the payment to the injured person completely satisfied that person's claim. That the latter type of settlement entitles the settlor to contribution is evident from the decision of the Ontario Court of Appeal in *Nesbitt v. Beattie*.[22]

Partial settlements raise more difficulties. Since a person has a right to be paid contribution only when one wrongdoer has become obligated to pay more than his fair share of the loss, it is not every partial settlement by a concurrent tortfeasor that will entitle him to contribution.[23] Whatever the injured person receives under a settlement with one tortfeasor must be taken into account in any proceedings against others who are concurrently liable for the loss; the plaintiff's recoverable loss will be diminished by the amount of any settlement made with one tortfeasor.[24] While it will normally be most satisfactory to secure a settlement that concludes the injured person's claims against all those who are liable to him in respect of the loss, this is not always

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[21] *Quaere*, though, whether Wachowich J. was correct to think that Salmon L.J. would have allowed contribution if D2 was able to establish that D1 was under no liability to P: see *supra*, note 16.

[22] *Supra*, note 10.

[23] This is not to say, however, that *quia timet* proceedings cannot be instituted, and entitlement to contribution litigated before the claimant has actually paid anything.

[24] See *Dixon and Dixon v. The Queen in right of British Columbia and British Columbia Hydro and Power Authority*, *supra*, note 11. See, also, *Bryanston Finance Ltd. v. de Vries*, [1975] Q.B. 703, at 723, [1975] 2 All E.R. 609 (C.A.).

possible. The present law encourages partial settlements between the injured person and one tortfeasor by allowing the injured person to sue others for any amount of his loss for which the settlement did not fully compensate him,[25] and by permitting the settling tortfeasor to recover from others who are concurrently liable any amount in excess of the share of the loss that he fairly ought to bear.[26]

The disadvantage of the present law, however, is that a person who purports to settle only his own share of the liability cannot thereby ensure that he will be immune from other legal proceedings. If the injured person sues the other tortfeasors, they may serve a third party notice upon the tortfeasor who had settled, and seek contribution from him.[27] Such a claim will succeed if the settlement figure was based on too low an estimate of either the injured person's loss or the settling wrongdoer's degree of responsibility for it. To allow a claim for contribution against a tortfeasor who has settled would seem seriously to limit the incentives that tortfeasors have for settling their own portion of the injured person's claim. However, the settling tortfeasor can often adequately protect himself from being required to make further payments by way of contribution by obtaining an indemnity from the injured person.

3. REFORM OF THE LAW

(a) Should There be a Right of Contribution Following a Full Settlement?

The first question is whether D1 should be able to claim contribution from D2 following a settlement between D1 and P that is in full satisfaction of P's claim. It will be recalled that section 3 of the *Negligence Act* specifically provides that a claim for contribution may be made by a tortfeasor who has settled with the person who has suffered damage for which the claimant and other tortfeasors are concurrently liable.

This is eminently sensible. Were the law otherwise, out-of-court settlements would be discouraged.[28] A person may properly be regarded as obliged by law to pay a sum of money whether or not that liability was established in litigation. Moreover, D1's payment will have conferred a benefit upon D2 by extinguishing D2's liability to P. The Commission

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[25] *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 149(1), discussed *supra*, ch. 2, sec. 2(a).

[26] *Negligence Act*, *supra*, note 2, s. 3.

[27] See *supra*, note 11.

[28] The English *Law Reform (Married Women and Tortfeasors) Act, 1935*, *supra*, note 1, was much less explicit on the right of a settling tortfeasor to claim contribution. However, principally for the reason given in the text, the Court of Appeal was prepared to stretch the language of the Act somewhat to cover the settlement situation: *Stott v. West Yorkshire Road Car Co. Ltd.*, *supra*, note 1. The *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.), s. 1(4), confirms this.

recommends, therefore, that a concurrent wrongdoer should be entitled to claim contribution from another concurrent wrongdoer where the former has settled with the injured person in full satisfaction of that person's claim.[29]

(b) D1's Liability to P: Its Relevance to Contribution Claims

As we have already seen, there is authority in Ontario for the proposition that the right to contribution extends to those who settle their supposed liability to the injured person, even if it subsequently transpires that they could not have been successfully sued by the injured person.[30] If the Commission's proposal that the right to contribution should be generalized so as potentially to include all concurrent wrongdoers, whether the conduct that caused the loss was a tort, a breach of contract, or a breach of a fiduciary or statutory duty, then situations in which settlements are made by those who could not be sued by the injured person may well increase. For example, a supplier of defective goods may decide to compensate an important purchaser in order to preserve goodwill, even though he may effectively have excluded his liability by inserting an exemption clause in the contract. Should the supplier in these circumstances be able to claim contribution from the negligent manufacturer whom the purchaser could successfully have sued in tort for his loss? Even where there is no contractual exemption clause, it may make commercial sense to compromise a claim rather than to litigate, notwithstanding that the person making the compromise does not believe that he would be held liable in a proceeding brought against him by the claimant.

To return to the restitutionary framework within which we have considered the appropriateness and extent of contribution claims among concurrent wrongdoers, the legal liability of the claimant for contribution to the injured person is relevant in two respects. First, it will not always be clear that a person who has settled a claim for which he was not legally liable thereby confers any *benefit* upon a person who is liable to the injured person. Thus, an *ex gratia* payment made for reasons of friendship, sympathy, or moral obligation is likely to be regarded as a collateral benefit for which P will not be required to account in his action against the person who is legally responsible for his injury.[31] In *Dawson v. Sawatzky*,[32] a neighbour,

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[29] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 17(1). The Draft Act appears as an Appendix of this Report. Concerning the calculation of the sum payable by D2 to D1, see *infra*, ch. 8, sec. 2(b).

[30] *Marschler v. G. Masser's Garage*, *supra*, note 12.

[31] A payment may, of course, constitute a collateral benefit even if the payor was legally required to make it. Payments made by insurers under indemnity insurance contracts are an obvious example.

[32] [1946] 1 D.L.R. 476, [1946] 1 W.W.R. 33 (Sask. C.A.).

who was being taken to hospital by the plaintiff, altruistically paid money to the plaintiff to compensate him for the damage caused to his vehicle in the course of the journey by the negligence of the defendant. The damages recoverable by the plaintiff from the defendant were not reduced by this sum.

In addition, there is a common law rule that a stranger's voluntary payment of another's debt does not necessarily prevent the creditor from suing the debtor.[33] If a person mistakenly settles a claim in circumstances where the payment does not satisfy or reduce the injured person's claim against others, then there would seem to be little to be said in favour of granting any right of contribution. It should be noted that the rule respecting the unauthorized payment of the debts of others evolved at a time when choses in action were less capable of assignment than they now are, and may therefore appear somewhat anomalous. However, the law still does not generally permit the assignment of claims to unliquidated damages.[34]

Even if the settlement does confer a benefit upon those who are liable to the injured person by discharging or reducing their liability, the fact that the settlement was made by a person who was not legally liable may require consideration of the principle that those who officiously confer benefits upon persons who have not requested them should not be entitled to restitution. A wrongdoer may thus argue that, while the settlement conferred a benefit upon him by reducing his liability, since the settlement was made by a person who was not otherwise under any obligation to the injured person, the payment was purely voluntary.[35]

There are certainly good arguments for confirming by legislation the position adopted in *Marschler's* case,[36] and extending it to other heads of alleged civil liability. First, it obviously encourages the settlement of claims by allowing D1 to claim contribution from those who are liable for P's loss

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[33] Goff and Jones, *The Law of Restitution* (2d ed., 1978), at 15, *n*. 91, and 250-51. However, when payment is made in full satisfaction of another's debt, the creditor may be prevented from suing his debtor because to do so would be a "fraud" on the payor, or a "breach of trust": *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330 (C.A.).

[34] The right to sue for damages for a tort or breach of contract may be assigned if it is connected with a property or some analogous interest: see Megarry and Baker (eds.), *Snell's Principles of Equity* (27th ed., 1973), at 72.

[35] For an example, see *Owen v. Tate*, [1976] Q.B. 402, [1975] 2 All E.R. 129 (C.A.), where the plaintiff became a surety for a debt without the request of the debtor. The plaintiff was required to pay the creditor, but was refused an indemnity from the debtor on the ground that he had officiously exposed himself to liability to the creditor. Compare *Norton v. Haggett*, 85 A. 2d 571 (Vt. Sup. Ct. 1952), where the plaintiff was denied restitution of money that he had paid to discharge a mortgage that secured a debt owed by the defendants. One reason for the decision was that the plaintiff had not told the mortgagee that he intended to take an assignment of the debt which, the mortgagee alleged, he would not have been willing to assign to the plaintiff.

[36] *Supra*, note 12.

even though D1 is not liable. Secondly, it seems contrary to common sense for D2 to be able to defeat D1's claim by establishing that D2 was exclusively liable to P, whereas D1's claim may succeed if he establishes that he was indeed liable to P, no matter how small his fair share of responsibility is ultimately determined to be. Thirdly, the benefit to D2 will normally be quite clear; he has been saved from having to pay a sum to P that he could otherwise have been legally compelled to pay. This is not the kind of "unrequested" benefit for which it is unfair to require D2 to pay: D1's payment has not deprived D2 of any real choice about the way in which D2 will allocate his resources.[37]

The issue has been considered in a number of other jurisdictions. The Report published by the Alberta Institute of Law Research and Reform recommends that a person who has settled another's claim should not be deprived of a right to contribution on the ground that he was not liable to the injured person.[38] The Report states that D1 is not required to establish that he had reasonable grounds for believing that he was liable to P; it is not made clear, however, whether contribution is available to a person who settled, correctly believing that he was not liable. The Institute may have intended this situation to be covered by its recommendation that a settlement must not be for an "excessive" amount. It could certainly be argued that any amount paid by a person who correctly believed that he was not liable at all is excessive, and that the sum recoverable in a contribution claim should be nil, as "the amount at which the claim should have been settled" by D1.[39]

Section 12(3) of the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada,[40] also provides for the recovery of contribution by a person who gave valuable consideration for a release of all those concurrently liable for the injured person's loss, whether the claimant for contribution "is a wrongdoer or not". The amount of the contribution recoverable is based on the lesser of the value of the consideration actually given and the amount that "in all the circumstances it would have been reasonable to give for the release". This latter provision could be used to deny any contribution at all to a person who settled despite his correct belief that he was not liable.

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[37] There may, of course, be situations in which D2 may be prejudiced by being obligated to D1, rather than to P. He may, for example, have been able to reduce his liability to P by bargaining from a position of strength, or the relationship between P and D2 may be such as to make it unlikely that P would press his claim against D2 to litigation. These considerations justify retaining an "officiousness" defence.

[38] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"), at 54, Recommendation 11. See discussion *ibid.*, at 53-54.

[39] *Ibid.*, at 56, Recommendation 12. See discussion *ibid.*, at 55-56.

[40] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

A similar result is reached by the Irish *Civil Liability Act, 1961*,[41] which provides for the recovery of contribution following a settlement by one of the wrongdoers.[42] Section 29(1) provides as follows:

> 29.—(1) In any proceeding for contribution, the contributor [D2] shall not be entitled to resist the claim on the ground that the claimant who has paid the injured person [P] was not liable to such person....

The provision in section 22(1) that if the amount of the settlement was excessive the court "may fix the amount at which the claim should have been settled", may also enable a court to reduce to zero the amount recoverable by way of contribution if the knowingly non-liable settlor should not have settled at all.

Section 4 of the American Uniform Comparative Fault Act[43] is not altogether clear whether a settlement between P and D1 gives rise to a right to contribution only if D1 can establish that he was liable to P for the injury at the time that he settled. For while subsection (1) confines the right of contribution to persons who are "liable" for a single loss, subsection (2), which specifically deals with contribution following a settlement by one person, does not include in the conditions precedent to a successful claim a requirement that D1 establish his liability to P. However, in those states in which a right to contribution among concurrent wrongdoers is recognized, the weight of authority favours allowing a person who has settled with the injured person, under a mistaken belief that he is liable, to recover contribution, provided only that if D2 has reasonably refused to join in the settlement he can contest the reasonableness of the amount paid by D1 and, of course, his own liability to P.[44]

In a recent Working Paper,[45] the New Zealand Contracts and Commercial Law Reform Committee has recommended that D1 should be able to claim contribution after settling with P, and that it should not be open to D2 to defend the claim on the ground that D1 was not liable to P. In order to protect D2 from being adversely affected by a settlement to which he was not a party, the Committee has recommended that the compromise must be "reasonable having regard to all the factors that influenced the settlement".[46]

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[41] *Civil Liability Act, 1961*, No. 41.

[42] *Ibid.*, s. 22(1).

[43] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part). The Act was approved by the Commissioners in 1977.

[44] Palmer, *The Law of Restitution* (1978), Vol. II, s. 10.6(a), at 398-401.

[45] New Zealand, Contracts and Commercial Law Reform Committee, *Working Paper on Contribution in Civil Cases* (1983), at 15-17. The Committee was also tentatively of the view that a wrongdoer who had settled the injured person's claim should not be subsequently liable to pay contribution to a concurrent wrongdoer (*ibid.*, at 17-18).

[46] *Ibid.*, at 17.

The English *Civil Liability (Contribution) Act 1978*[47] enables a person to claim contribution after entering into a *bona fide* settlement with the injured person. The relevant section provides as follows:

> 1.—(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, *provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.*

The inclusion of both the requirement that the settlement must have been made *bona fide* and the emphasized words was presumably intended to exclude claims for contribution by those who have settled a claim for their own extraneous reasons that may be unconnected with any belief in their liability and claims for contribution by those whose conduct could not in law have exposed them to liability.

A common feature of the above proposals for reform and of legislation that has dealt with the issue expressly, is that a person who has settled an injured person's claim should not be prevented from seeking contribution solely because that claimant could have successfully defended litigation instituted against him by the injured person. The Commission is of the view, and accordingly recommends, that, in order to encourage the settlement of disputed claims, a person from whom contribution is claimed should not be able to defend the claim merely on the ground of D1's non-liability to P.[48] There seems little reason why D2 should be entitled to the windfall of a reduction of his liability to P as a result of a mistakenly settled claim between P and D1. The production of evidence by D2 that D1 *might* have been able to persuade P not to enforce his claim against him should not in itself suffice to relieve D2 of liability to D1. Nor should D1's right to contribution depend upon whether P's claim against him would fail on the facts, as opposed to a question of law: the distinction between mistakes of law and of fact is often difficult to draw, and the significance that it has assumed in the law of restitution has been much criticized.[49] It would be unfortunate if it were to be made a critical element in the context of contribution claims. A benefit that is conferred as a result of a mistake, whether of fact or law, should not be regarded as officiously thrust upon the recipient.

Most settlements of asserted liability are presumably made by those who believe that their conduct has indeed exposed them to liability to the claimant, or at least who think that the claimant's allegations are sufficiently plausible that there is a risk that legal proceedings may be taken against them, which may result in a finding of liability. To permit persons who settle

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[47] *Supra*, note 28, s. 1(4).

[48] Draft Act, s. 17(2).

[49] Goff and Jones, *supra*, note 33, at 91-92.

in these circumstances to seek contribution will effectively dispose of most cases. However, there may well be some situations that are not covered. These include cases in which a person who has no connection at all with the injury settles the injured person's claim, whether for reasons of altruism, friendship, or moral obligation.[50] Similarly, a person who knows that he has a cast-iron defence to any proceedings that P might institute may nonetheless decide to pay in order to avoid the bother of defending litigation or to preserve his commercial reputation or goodwill with P. Assuming that any payment by D1 in these circumstances does reduce or discharge D2's liability to P, should D1 be able to advance a claim for contribution on the theory that it would be unjust not to require D2 to pay D1 for the benefit that D1's payment to P has conferred upon D2?

To confer a right upon anyone who has paid money to an injured person to claim what amounts to an indemnity from those legally responsible for the injury, regardless of whether the payor either had any connection with P's loss or believed that he was or might be held liable, would seriously undermine the principle that claims for unliquidated damages are not freely assignable. A less friendly claimant may thus be thrust upon D2 to his detriment. On the other hand, to attempt in advance to specify comprehensively the circumstances in which claims for contribution will or will not be permitted is unlikely to succeed.

The Commission has come to the conclusion and, accordingly, recommends that the court should be empowered to refuse contribution if the person claiming contribution made the settlement without believing that he was or might be liable and without regard to any legal proceedings that might be instituted against him by the injured person for the claim settled.[51]

(c) Partial Settlements and the Right to Contribution

(i) Introduction

The problems considered in this section arise whenever a person settles a claim by the injured person in such a way that other concurrent wrongdoers remain liable to P, although the sum that they may be required to pay to the successful plaintiff will be reduced by the amount of the settlement. The important questions are, first, whether the settling wrongdoer should be able to claim contribution from the others, and secondly, whether a wrongdoer who has been sued to judgment by P, or who has settled P's claim, should be able to recover contribution from a person who had ceased to be liable to P because he had already settled with the injured person.

Although these questions raise their own particular problems, they ought initially to be considered together. The reason is that, if a person who settles for more than his fair share of P's loss *is entitled* to contribution, it

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[50] See, for example, *Dawson v. Sawatzky*, *supra*, note 32.

[51] Draft Act, s. 17(2).

might be expected that a wrongdoer who is able to purchase his immunity from suit by the plaintiff for a price that is less than his fair share *should be liable* to contribution claims from other concurrent wrongdoers. The difficulty with this argument, of course, is that it effectively prevents a wrongdoer from settling his own estimated share of P's loss in the knowledge that he will be immune from suit from both P and other concurrent wrongdoers. This, as we have noted, may deter early settlements for less than P's full claim by one of a number of possible defendants.

The evenness of the balance of the competing policy considerations that bear upon this problem is indicated by the range of solutions that have been recommended or actually adopted in jurisdictions that have dealt with it. Before examining the possibilities, it may be helpful to set out the principal policy concerns that any solution must attempt to address. First is the interest in encouraging the settlement of liability without resort to litigation. It is obviously good policy to minimize the occasions on which the expenses and delays of litigation are incurred by individuals, and to ensure that judicial resources are not spent wastefully. Any satisfactory rules should not discourage settlements by either imposing unduly severe consequences upon parties who make an unfavourable settlement, or withholding finality from a settlement made in order to avoid the possibility of litigation. The law should seek to uphold the legitimate expectations of those who have entered into settlement agreements.

A second relevant concern is that the injured party should be able to recover proper compensation for those legal wrongs that have caused his loss. The injured person may also be in immediate need of cash, which a settlement would provide. Third is the consideration that those who are not parties to a settlement should not be prejudiced by an agreement made between the injured person and one of the wrongdoers. Fourth is the need to provide clear and workable rules by which the rights and duties of the parties are regulated. It will become apparent that it is extremely difficult to satisfy all these interests to the fullest extent, and that the task of reformers is to strike the best balance in as many situations as possible.

Most of the difficulties discussed below will be avoided if the injured party and all those against whom he has a claim in respect of his loss join in the settlement, and agree to the sum that each is to pay to the injured person in final settlement of the claim. There will, however, be instances in which P and only one of the possible concurrent wrongdoers settle for less than P's legally recoverable loss: for instance, P may not know at the time of the settlement that others may also be legally liable for the loss; they may refuse to settle because they doubt the validity of P's claim; they may believe that difficulties of proof will deter P from suing them; or they may think that P will not pursue his claim against them if he receives some compensation from one of the wrongdoers.

We now turn to consider several possible solutions to the problems that arise where a partial settlement is entered into with one concurrent wrongdoer.

(ii) Alternatives for Reform

a. No Change in the Law

The first possibility is to leave the law as it probably already is, so that the liability of D2 to P is reduced by the amount paid under a settlement between P and Dl. If D2 is subsequently sued by P, he may join Dl as a third party and claim contribution for any amount by which the judgment against D2 exceeds D2's fair share of the liability. Similarly, if Dl has settled for what he believes to be more than Dl's fair share, he may institute proceedings against D2 for contribution for the excess.

This approach was recommended by the English Law Commission[52] and appears to have been adopted by the English *Civil Liability (Contribution) Act 1978*.[53] Indeed, the issue arose in the recent case of *Logan v. Uttlesford District Council*,[54] in which it was held that a person (D2) who had settled P's claim in a way that did not bar P from suing a concurrent wrongdoer (Dl) could be brought into the litigation by a third party notice served by Dl, and made subject to a claim by Dl for contribution. It was no defence that by the time P sued Dl, D2 had ceased to be liable to P by virtue of having partially settled P's claim.

The advantages of this solution are that it is already familiar to Ontario lawyers and courts, appears not to have caused dissatisfaction, and encourages settlement by P, who can always sue D2 if the amount for which P settled with Dl falls short of P's total recoverable loss. Moreover, it encourages Dl to settle by enabling him to recover contribution from a concurrent wrongdoer if the settlement figure exceeds his fair share of their liability.

The principal disadvantage of this solution is that it prevents Dl from effecting a final settlement of his liability because he may be deprived of the benefit of a good settlement by remaining liable to claims for contribution from others who are concurrently liable for P's loss. Since the most important reason for entering a settlement is to avoid the expense and aggravation of litigation, Dl is denied the principal benefit of his bargain. From Dl's point of view, a third party notice, or a separate action, by D2 for contribution is as troublesome as a further suit by P. And since it will often be difficult for Dl accurately to estimate his own proper share of liability for a claim to unliquidated damages, contribution claims after the settlement will be far from uncommon. However, Dl can minimize this hazard by obtaining an undertaking from P to indemnify him against claims for contribution successfully made by concurrent wrongdoers. Of course, Dl may still have to

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[52] The Law Commission, *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977).

[53] *Supra*, note 28.

[54] *The Times*, London (February 21, 1984).

defend the contribution claim, and will have the burden of recovering from P the amount covered by the indemnity.

b. No Right of Contribution

The most radical solution to the contribution difficulties produced by a partial settlement made by one concurrent wrongdoer is to deny him any right of contribution, and to protect him from any subsequent claim for contribution by a concurrent wrongdoer who has either been found liable to P or made a settlement with P. The key feature of this alternative is that, in litigation between P and D2, the court determines whether D2 is liable to P, assesses P's recoverable loss, but gives judgment against D2 only for the amount of P's loss that is proportionate to D2's degree of fault. This involves a departure from the principle of liability *in solidum*, which the Commission has endorsed in chapter 3, and requires the court to allocate responsibility for P's loss among D2 and the concurrent wrongdoers who have settled, although they will not be parties to the litigation. The most significant difference that this makes to the litigation between P and D2 is that any settlement between P and D1 is ignored for the purpose of quantifying D2's liability.

An example will illustrate the way in which the above alternative operates. Suppose that P, a cyclist, is injured when D1's car collides with him. D1 had swerved in order to avoid D2's small child who had run into the road. P calculates that his loss is $5,000; D1 accepts this figure, estimates that, as between himself and the parent of the child, he was no more than 50 percent to blame, and offers to settle P's claim. Suppose, further, that neither P nor D1 has been able to identify D2, the parent in charge of the child, or that D2 refuses to settle because he does not think he is liable. D1 offers P $2,500 in final settlement of P's claim against D1. P needs the money, and, in order to avoid the expense, delay, and uncertainties of litigation, accepts D1's offer. If P subsequently sues D2, the court might find that D2 was negligent, and that P's recoverable loss is $5,000. However, it might conclude that D1 was more at fault than D2, and that D2 was only 25 percent to blame. Judgment would be given in P's favour against D2 for the proportion of P's recoverable loss ($5,000) that D2 should fairly bear (25% x $5,000 = $1,250). P will thus have recovered in all only $3,750. This will be because he underestimated the extent of D1's share of the liability. P would also fail to recover his total loss if his settlement with D1 underestimated the total amount of P's loss for which a court subsequently held the concurrent wrongdoers liable.

If this proposal requires P to bear the cost of a poor bargain with D1, it also enables P to retain the benefit of a good one. To use the above example again, if a court were to conclude in the litigation between P and D2 that D2's share of the responsibility for P's loss was 75 percent, then judgment would be entered in P's favour for $3,750 (75% x $5,000). P would thus have recovered $6,250 under the settlement with D1 and the judgment against D2, even though if he had not settled, but had sued either D1 or D2, or both, he would only have been awarded $5,000. P has thus benefited from making

a shrewd settlement with D1. P would also benefit similarly if the settlement with D1 had been based on an estimate of P's recoverable loss that was higher than the amount for which a court later assessed P's loss in proceedings against D2.

The Alberta Institute of Law Research and Reform has recommended this solution,[55] which has been adopted in section 12(2) of the Canadian *Uniform Contributory Fault Act*.[56] The American Uniform Comparative Fault Act[57] now contains a similar provision: section 4(b) states that a person whose settlement with the injured person does not discharge the liability of concurrent wrongdoers has no right to contribution. Conversely, section 6 protects the settling tortfeasor from any subsequent liability to pay contribution to a concurrent wrongdoer who has been required to compensate the injured person. In order to protect D2 from being prejudiced by the terms of the settlement between P and D1, to which he was, *ex hypothesi*, not a party, section 6 reduces P's recoverable loss from D2 "by the amount of the released person's equitable share of the obligation".

The advantages of this scheme are manifest. First, if a final settlement of the injured person's claims against all possible wrongdoers is not attainable, removing the possibility that D1 may subsequently be confronted with a claim for contribution by another concurrent wrongdoer will encourage him to settle his own estimated share of the liability. Secondly, the proposal does not unduly strengthen or weaken P's bargaining position with D1, because, by reducing D2's liability to his fair share, it makes P bear the cost of a poor settlement with D1 and allows him to keep the benefit of a good one. In other words, when bargaining with D1, P is in much the same position as he would have been in if there had been no concurrent wrongdoer. Thirdly, the proposal leaves the liability of D2 unaffected by the terms of the settlement. Because D2's liability is quantified without regard to the settlement figure, D2 neither obtains a windfall as a result of P's extracting a particularly high settlement from D1; nor is he prejudiced by some unduly low settlement, made perhaps as a result of collusion between P and D1. It is simply unnecessary for a court to embark upon the difficult task of

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[55] Alberta Report, *supra*, note 38, at 61, Recommendation 13. See discussion *ibid*., at 57-61.

[56] *Supra*, note 40.

[57] *Supra*, note 43. It is instructive to note that this is the third solution adopted by the Uniform Act. The 1939 version (National Conference of Commissioners on Uniform State Laws, Uniform Contribution Among Tortfeasors Act, in Uniform Laws Annotated, Vol. 12, at 57) allowed a claim for contribution to be made against a tortfeasor who had too cheaply settled his own share of the liability to P. It was criticized for discouraging settlements. As a result, in 1955 (*ibid*.) the settling tortfeasor's liability to contribution was abolished, and the liability of other concurrent tortfeasors was reduced by the amount for which P's liability had been *bona fide* settled. The problem with this, however, was that the difficulty that D2 would have in establishing lack of *bona fides* in the settlement between P and D1 was likely to cause D2 to be prejudiced by a settlement to which he was not party. See Fleming, "Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcyle Association v. Superior Court" (1979), 30 Hastings L.J. 1465.

attempting to determine whether the settlement between P and D1 was reasonable, *bona fide*, or collusive: the terms of the settlement cannot prejudice D2 in any way.

Nonetheless, there are serious drawbacks against which these advantages must be balanced. The most obvious is that the proposal purchases the benefits of the finality of the settlement between P and D1, and achieves equity between D1 and D2, at the price of derogating from the principle that the purpose of civil litigation is to ensure that the injured person is fully compensated, no more and no less, for the loss that is attributable in law to the wrongful conduct of the defendant. As we have seen, the proposal under consideration can produce a judgment in P's favour against D2 that either fails to compensate P to the full extent of his legally recoverable loss, or that, when the amount of the settlement is taken into account, awards him a sum greater than he could have obtained in litigation if there had been no settlement.[58] By denying a right of contribution to D1, and reducing P's recovery against D2 to the latter's proper share, the scheme puts a premium on the stronger party to the settlement exerting maximum pressure upon the other in order to obtain the most favourable settlement.

In some circumstances, this might mean that the insurance company of a tortfeasor would bring pressure to bear upon an injured person to accept a low settlement, pressure to which the victim might be all too vulnerable if he is in immediate need of money, is not legally advised, or has not fully recovered from the effects of his injuries.[59] The proposal to abolish rights of contribution following settlement and to reduce the amount of the plaintiff's damages against D2 to the latter's own share would prevent the injured person from recovering from a bad bargain by suing other concurrent wrongdoers for the full amount of his loss minus the sum paid under the settlement.

In other situations, it may be the injured person who is in the stronger position, and thus able to extort a particularly generous settlement from one wrongdoer. This may especially be the case if the right of contribution is extended, as the Commission has recommended, to include other heads of civil liability in addition to torts. For instance, suppose that the Ministry of Transportation has engaged a firm of civil engineers in connection with the design and supervision of the construction of a new highway. The highway soon requires extensive repairs because of a design defect, and because one of the construction companies employed by the Ministry on the project

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[58] Williams, *Joint Torts and Contributory Negligence* (1951), at 153, states that the scheme was objectionable because "it ignores the rather strong feeling that one has against allowing the plaintiff to recover double damages". That the scheme may prevent the plaintiff from recovering in full against D2 is a more serious weakness, particularly in cases of death or personal injury. It seems paradoxical that P should fare less well against D2 than he would have done if there had been no D1 with whom P had settled.

[59] In extreme cases of overreaching, the injured person may be able to resile from a settlement that was extorted by unconscionable abuse of power, fraud, or misrepresentation.

executed the work carelessly. If the engineering firm is heavily dependent upon government contracts for its business, it is likely to be willing to settle the Ministry's claim generously in order to preserve commercial goodwill. It may seem unjust that if the settlement is less than complete satisfaction, the Ministry can still sue the construction company for its share of the responsibility, and not account for the compensation that it has already obtained under the settlement.

One answer to these objections may be that as long as the law permits an injured person to make a final settlement of his claim against someone whom he believes to be legally liable, it is inherently likely that the settlement figure will be either greater or smaller than the amount that a court would have awarded. Why, then, should it be offensive if the injured person settles with one wrongdoer but has to sue another? The person sued is not prejudiced by the settlement; indeed, he is given the full benefit of the existence of another wrongdoer. The appropriate reply to this may be that while there are sound reasons of policy for enabling parties to settle for whatever sum they can, it does not necessarily follow that the effects of freedom of contract should be extended to court-determined liability. In this latter context, full compensation for wrongfully caused injuries is the overriding policy.

A second objection to the Alberta Institute's scheme and to section 12(2) of the *Uniform Contributory Fault Act* is that to deny any right to contribution where D1's settlement does not completely discharge D2's liability to P, but to allow contribution where it does, may produce arbitrary results. Thus, when faced with an injured person who is able to drive a hard bargain, a wrongdoer might well be advised to settle the whole of P's claim in order to retain the opportunity of passing some on to a concurrent wrongdoer. In order to ensure that he has done so with any degree of certainty, the wrongdoer will have to agree to a settlement figure that is at least the amount that P could recover in litigation, a matter that will be difficult to predict with precision. Alternatively, D1 must seek to insert into the settlement a clause providing that the injured person is releasing not only D1, but any other person against whom he may have a claim in respect of the loss. However, if the injured person is in the stronger bargaining position, he is unlikely to agree to this.

A third difficulty with the proposal concerns the conduct of the litigation between P and D2. The burden of establishing D2's liability and proportionate responsibility for the loss will be upon P. In order to discharge this burden, it will generally be necessary for P to call D1 as a witness in an attempt to minimize D1's degree of fault. This may provide an occasion for collusion between P and D1 to underestimate D1's responsibility for the injury.[60]

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[60] The Law Reform Commission of Hong Kong initially thought that the fact that the settling wrongdoer would not be a party to the litigation brought by the injured person against other concurrent wrongdoers was a fatal objection to the adoption of a scheme of

Another possible solution is to couple a denial of any contribution following a partial settlement with a provision that when P sues D2, P's damages will be calculated by subtracting from his full recoverable loss the amount of the settlement between P and D1 or D1's proportionate share of the liability, whichever is less. Suppose, for example, that P's loss is $1,000, and D1 settles his share of the liability for $300. If D2 is then found to be liable to P, and his due portion of the liability to be 50 percent, then P will recover $700. P is not thereby penalized in his litigation with D2 for a poor settlement with D1; D2 is the one who bears the loss. If, on the other hand, P's settlement with D1 proves very favourable because D2 is found 90 percent to blame, then P will be awarded $900 in damages against D2. D2 pays his proper share, but if the amount of the settlement with D1 is added to the judgment against D2, P will have received more than his recoverable loss.

The advantages of this scheme are that it makes the settlement between P and D1 final and, by ensuring that however unfavourable the settlement is for P, P is able to receive full compensation from D2, it does not elevate considerations of fairness between D1 and D2 over the aim of allowing P full recovery. Its disadvantage, however, is that it regulates the quantum of D2's liability by the amount of the settlement, and thus exposes D2 to the risk of having to pay P more than his fair share of the loss, without giving him an opportunity of obtaining contribution from the other concurrent wrongdoer. The possibility of a collusive settlement between P and D1, under which D1 settles for a minimal figure and P recovers the remainder from D2, is all too real. The difficulties of defining improper collusion in this context, and of producing the necessary evidence to prove it, are likely to be immense.

Moreover, it seems objectionable in principle that D2's liability to P—which he cannot apportion among those concurrent wrongdoers who have settled—can be increased beyond his fair share by the terms of a settlement to which he was not a party. In short, this proposal comes all too close to the vice of the common law rule in *Merryweather v. Nixan*:[61] it gives the injured person power to choose which wrongdoer will ultimately bear the burden of compensating him for the loss.

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this kind. However, the Commission received representations from the Bar that this was unlikely to be a problem. The settling wrongdoer could be subpoenaed either by the plaintiff, who would be anxious to minimize the responsibility of the settling wrongdoer, or by the defendant, who would wish to maximize it. It was also pointed out that there would be many instances in which the degree of responsibility to be attributed to the defendant could be established by evidence other than that provided by the wrongdoer who had settled.

The Commission ultimately rejected this solution, however, because of its potentially harmful consequences for plaintiffs. See The Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers*, Topic 5 (1984), paras. 4.10-4.18, at 17-21.

[61] (1799), 8 T.R. 186, 101 E.R. 1337 (K.B.). See *supra*, ch. 4, sec. 2.

c. One Way Contribution

A variation on the scheme considered above is contained in the Irish *Civil Liability Act, 1961*,[62] which, like much of the rest of the statute, is based upon a proposal and draft bill of Professor Glanville Williams.[63] This scheme differs from the Alberta proposal and the Canadian *Uniform Contributory Fault Act* in that it prevents the injured person from recovering, as a result of a partial settlement with D1 and a judgment against D2, more than the amount that he would have recovered if he had not settled with D1. This is achieved by section 17(2), which provides that if P settles with D1 and then sues D2, P's damages will be the difference between P's total loss and the amount of either P's settlement with D1 or D1's proper share of the liability, whichever is the greater. D2 has no right of contribution against D1, but D1 may claim contribution from D2.

An example illustrates the operation of this scheme. P has suffered a loss of $1,000 as a result of an automobile accident for which D1 and D2 are concurrently liable. P and D1 settle for $400 on the assumption that D1 is 50 percent to blame. If P institutes proceedings against D2 in which D2 is held liable, but is found to be only 30 percent responsible, judgment will be given in P's favour for only $300. This is the difference between P's total loss and the amount of D1's fair share of responsibility. If, on the other hand, D2 is found to be 70 percent responsible, then P will recover $600, because on these facts the settlement figure is greater than D1's proper share. As these examples show, the effect of the Irish Act's solution is to prevent P from ever obtaining more than his legally recoverable loss; however, it makes P pay for a poor settlement with D1 by identifying him with the fair share of D1's responsibility.

This scheme would seem less likely to promote settlements than that proposed by the Alberta Institute and the American Uniform Comparative Fault Act. This is because if the injured person underestimates the degree of fault of D1 and settles for too low a figure, he bears the shortfall; but this risk is not offset by the possibility that if he settles favourably with D1, he can keep the benefit of a good bargain.

On the other hand, the Irish Act allows D1 to recover contribution from D2 if D1 settles for more than his proportionate share; thus, D1 can afford to settle on fairly generous terms with P in the knowledge that he can claim

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[62] *Supra*, note 41.

[63] See Williams, *supra*, note 58, at 152-55 and 207. See, also, Tasmania's *Tortfeasors and Contributory Negligence Act* 1954, No. 14 of 1954, s. 3(3) (found in Tasmanian Statutes 1826-1959 (Reprint), Vol. 6). Section 3(3) renders contribution unnecessary by providing that if a plaintiff who has settled with one concurrent tortfeasor subsequently sues another, the damages recoverable in this action are reduced by the amount paid for the release, or any amount or proportion by which the release stipulates that the total claim against the settling tortfeasor shall be reduced, or the proper share of the liability that the settling tortfeasor should bear, whichever of these amounts is the greatest.

contribution for any excess. By protecting D1 from the possibility of a later contribution claim in the event that D1 settles for less than his proportionate share, the Act gives finality to the settlement and thus provides an incentive to D1 to reach a settlement with P. The scheme also prevents D2 from being unfairly affected by the settlement between P and D1 because D2 can never be made liable for more than his judicially determined share of the liability.

(iii) Conclusions

It should be apparent from the preceding consideration of the principal solutions to the contribution problems posed by partial settlements that each has its own strengths and weaknesses. It is difficult to produce a rule that will encourage the making of fair and final settlements, ensure that the injured person is fully compensated, but no more, and produce equity among concurrent wrongdoers. It seems that some policy objectives can be attained only by sacrificing others. It thus becomes necessary to decide whether some policy objectives are more important than others.

There is obviously much to be said for retaining the present law, based on the view that the overriding consideration should be to ensure that the injured person is properly compensated, and that, if he makes a poor bargain with one wrongdoer, he should be able to take full advantage of the existence of another wrongdoer whose conduct also caused his loss. Since the object of civil proceedings for breach of an obligation is generally to compensate the injured person, his recovery against D2 will be reduced by the amount for which D1 settled P's claim. If the present law achieves this result, it is a very considerable strength. To allow contribution policy to determine the primary rights of the injured person is to permit the tail to wag the dog.[64]

On the other hand, the inability of one wrongdoer to make a final settlement of his own estimated share of responsibility may well discourage some settlements from being made. However, the extent to which the present law discourages settlements should not be overemphasized, particularly in the absence of empirical data: the fact that under the present law P's claim against D2 is not prejudiced by a poor settlement with D1, and that D1 may seek to recover contribution if he settles too generously, may well provide ample incentives to settle by giving each party a further opportunity to recover from a bad bargain. Finally, despite the complications that may theoretically arise from giving rights of contribution after a partial settlement, this is a system with which lawyers in Ontario have become familiar. It appears to have provoked few allegations of injustice or inconvenience.

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[64] It should be noted, however, that the practical effect of D1's extracting an indemnity from P against further liability is to reduce the amount of the damages for his loss that P will be able to retain. It would be a mistake, therefore, to overemphasize the practical differences between the Canadian *Uniform Contributory Fault Act*, *supra*, note 40, and the position taken by the Commission in this Report.

Nor is it without significance that the English Law Commissioners and the British Parliament have recently decided to retain it.[65]

Nonetheless, in addition to both statutory reforms and recent recommendations for reform, there is considerable academic and some practitioner support[66] for a regime that immunizes the settling wrongdoer from claims for contribution and achieves justice between D1 and D2 by placing the cost of a poor settlement upon the injured person. The Canadian *Uniform Contributory Fault Act* and the American Uniform Comparative Fault Act illustrate the adoption of this option, as does, with some variation, the Irish *Civil Liability Act, 1961*. Recent Reports of the Alberta Institute of Law Research and Reform and the New Zealand Contract and Commercial Law Reform Committee[67] have recommended its adoption. In addition, Professors Glanville Williams[68] and John G. Fleming, among others, have given it their support. Addressing himself to the objection that the version of the scheme ultimately accepted by the American National Conference of Commissioners on Uniform State Laws (and the Alberta Institute) allows an injured person to recover more than his total loss, Fleming has written:[69]

> Nor does the windfall aspect present a serious argument to the contrary. The purpose of the one-satisfaction rule is to prevent the plaintiff from unjustly enriching himself at the expense of the defendants, but here that principle is not violated: the non-settling defendants will still not be required to pay any more than their apportioned shares and the settlor has bought his peace.

In addition to encouraging final settlements, preventing the bargaining strengths of the parties from being skewed by the presence of a concurrent wrongdoer who has not joined in the settlement, and achieving justice between D1 and D2, the abolition of rights of contribution would simplify the law. It will be recalled that the complications of contribution, and especially their possible adverse effect upon the efficient vindication by the injured person of his rights, have been used to justify the denial of contribution among wrongdoers altogether.

Moreover, it can be argued that to subject a person who has settled his portion of the loss to a claim for contribution, if it turns out that he paid less than a fair share of his liability, not only removes an incentive for settling, but also is inconsistent with the restitutionary premises upon which rights of

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[65] See *supra*, notes 52 and 53 and accompanying text.

[66] In addition to the writers whose views are noted in the text, see, also, Larson, "A Problem in Contribution: The Tortfeasor with an Individual Defense against the Injured Party", [1940] Wis. L. Rev. 467; MacPherson, "Contribution and the Distribution of Loss among Tortfeasors" (1975-76), 25 Am. U.L. Rev. 203; and Teplitsky and Gomberg, "Acceptance of Money Paid into Court by One of Several Defendants: Lawyer Beware" (1977-78), 1 Advocates' Q. 123.

[67] *Supra*, note 45, at 17-18.

[68] *Supra*, note 58, at 152 *et seq*.

[69] *Supra*, note 57, at 1497-98. But see Williams, *supra*, note 58.

contribution are based. For if D1 has already settled, albeit cheaply, by the time that D2 is held liable to the injured person, D1 derives no benefit from D2's satisfaction of the judgment because D1 is no longer liable to P. An essential element of the claim for contribution is therefore absent: D1 has not been unjustly enriched at D2's expense.

The argument that a person who was once liable to P, but whose liability had ceased by the time that a concurrent wrongdoer is required to compensate P, should not be subject to a claim for contribution can be applied in other situations. This issue has often surfaced in connection with limitation periods. Suppose, for example, that D1's *prima facie* right to contribution arises when D2 can no longer be successfully sued by P because the limitation period governing P's cause of action against D2 has lapsed. Or D2 may have become immune from suit by P because P has already instituted legal proceedings against him and has been unsuccessful. These difficult questions are explored more fully in chapter 7 of this Report.

For present purposes, it suffices to note that the fact that D1 has become immune from suit by P by virtue of his settlement is not necessarily a conclusive argument against D2's subsequently claiming contribution. It can be argued, for instance, that by settling his liability for a sum that is smaller than his comparative degree of fault, D1 has undeniably received a benefit. The benefit has been conferred upon him by the injured person. The key policy question posed is whether D1 should be able to retain this benefit. If the answer is that he should, because he has bargained for it, then no claim for contribution ought to be allowed against him. However, this conclusion prompts a further question: if D1 is to keep the benefit without paying for it, upon whom should its cost fall? One possibility is that since the benefit was conferred by the injured person, he should pay for it by a reduction in the damages that he can recover from D2. As we have seen, this can be accomplished by limiting P's recovery to D2's share of the fault. The alternative is that the cost should be borne by D2 who remains liable to P for the full amount of P's loss, less the figure at which P and D1 settled. For reasons already discussed, neither alternative is entirely satisfying.

After weighing the various alternatives for reform, the Commission has concluded that D1 should not be able to retain the benefit of a favourable settlement with the injured party. He should remain liable to a claim for contribution from a concurrent wrongdoer who is required to pay more than his fair share of P's loss. We are also of the view that, if the wrongdoer who has partially settled the injured person's claim is under a duty to contribute when he has settled well, it is only fair that he should have a right to contribution when he has made a poor settlement. The liability for contribution of the wrongdoer who has settled has generally been regarded as a more unattractive feature of the present law than his right to contribution where he pays P more than his proper share.

Accordingly, the Commission recommends that a person should be entitled to institute or continue a claim for contribution if he settles the

injured person's claim in such a way as to reduce, but not extinguish, the liability of other wrongdoers concurrently liable for the injured person's loss.[70] The amount of contribution would be in respect of the consideration given by the settling wrongdoer that exceeds his proportionate share of the responsibility for the damage. We further recommend that if an injured person obtains judgment against a wrongdoer, his damages should be reduced by any consideration already given to him under a settlement by another concurrent wrongdoer.[71] Finally, we recommend that, where, following a settlement between the injured person and a concurrent wrongdoer, another concurrent wrongdoer has been held liable to the injured person or has settled the injured person's claim for an amount that exceeds his proportionate share of the liability, he should be entitled to claim contribution from the first concurrent wrongdoer for the excess, even though the first concurrent wrongdoer has ceased to be liable to the injured person by virtue of his own settlement with that person.[72]

Some other questions remain concerning the sum to which a wrongdoer who has settled may require a concurrent wrongdoer to contribute. In particular, it may well be unfair to make the settlement figure determinative. D2 is entitled to be protected from having to contribute to a sum that exceeds an amount for which it was reasonable for D1 to settle P's claim. These matters are considered in chapter 8.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Where a person who has settled the claim of an injured person claims contribution from another who he alleges is liable for the injured person's loss, it should be no defence to the contribution claim that the claimant could never have been successfully sued by the injured person. However, the court should be empowered to refuse contribution if the person claiming contribution made the settlement without believing that he was or might be liable and without regard to any legal proceedings that might be instituted against him by the injured person for the claim settled.

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[70] Draft Act, s. 17(1).

[71] *Ibid.*, s. 16. Our recommendation, unlike s. 1(4) of the English *Civil Liability (Contribution) Act 1978*, *supra*, note 28, does not require that the consideration for the settlement must take the form of a "payment" of money by the wrongdoer to the injured person. Instead, a contract price may be reduced, services rendered, or goods delivered. For a brief discussion of the issue in relation to the 1978 English Act, see Dugdale, "Statutes [:] The Civil Liability (Contribution) Act 1978" (1979), 42 Mod. L. Rev. 182, at 185.

[72] Draft Act, s. 15(d).

2. A person who settles a claim made against him by the injured person should be entitled to institute or continue a claim for contribution from those concurrently liable if the settlement provides for the discharge or reduction of the liability of the other concurrent wrongdoers to the injured person.

3. If an injured person obtains judgment against a wrongdoer, his damages should be reduced by any consideration already given to him under a settlement by another concurrent wrongdoer.

4. Where, following a settlement between the injured person and a concurrent wrongdoer, another concurrent wrongdoer has been held liable to the injured person or has settled the injured person's claim for an amount that exceeds his proportionate share of the liability, he should be entitled to claim contribution from the first concurrent wrongdoer for the excess, even though the first concurrent wrongdoer has ceased to be liable to the injured person by virtue of the settlement.

CHAPTER 6

DEFENCES TO CONTRIBUTION CLAIMS: LIABILITY TO THE INJURED PERSON

1. INTRODUCTION

The preceding chapters of this Report have been concerned principally with the ingredients of a claim for contribution made by a person (D1) who has been held liable to, or who has settled with, the injured person (P). So far, little attention has been paid to the defences to the claim for contribution that may be available to the person from whom contribution is sought (D2). However, in chapter 4, we recommended that the legal nature of the liability that resulted in a single loss to the injured person should not defeat a claim for contribution. In this chapter and the next, we shall focus upon the possible defences that may be raised against a claim for contribution made by a person who has *prima facie* established an entitlement. This chapter considers, first, whether, in separate proceedings instituted against D2 by D1, D2 should be able to assert that the court that found D1 liable to P erred in its conclusion, either in fact or in law, or that the court in the earlier proceedings wrongly assessed the quantum of the loss suffered by P that could properly be attributed to D1's wrongdoing.[1]

Secondly, the chapter examines situations in which D2 could *at no time* have been held liable to P for the loss sustained as a result of the conduct of D1 and of D2. Should it invariably be a defence to a contribution claim that D2 was never liable to P for the loss in respect of which D1 has been held liable or has settled? Chapter 7 considers the relevance to a claim for contribution of events that occurred after P's loss was sustained, as a result of which D2 may have become immune from a successful suit by P. These events include the expiry of a limitation period within which P must sue D2, and entry of judgment in favour of D2 in proceedings instituted by P.

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[1] Somewhat similar issues may arise when D1 has paid compensation to P under a settlement: should D2, when sued for contribution by D1, be able to assert that D1 was not in fact liable to P at all, or that had the matter been litigated, P would not have obtained judgment against D1? This, and other aspects of contribution claims following a settlement between the injured party and one concurrent wrongdoer, were the subject of chapter 5 of this Report.

2. LIABILITY OF D1 TO P

In this section, we are concerned with whether the existence of a judgment in favour of an injured party against a wrongdoer should in itself be sufficient to support a right to contribution, where the concurrent wrongdoer against whom contribution is claimed alleges that the court in the earlier litigation erred in its finding of liability or quantum. Because, under the rule in *Cohen v. S. McCord & Co. Ltd.*,[2] the present law of Ontario does not normally permit a person who has been sued successfully by an injured party to claim contribution in a separate action, the problem has not had to be considered by our courts. However, the creation of the Federal Court of Canada, with exclusive jurisdiction over suits against the federal Crown, but apparently no constitutional competence over claims for damages against others, including concurrent wrongdoers whose liability is not founded on applicable federal law, may give rise to these problems in the future.[3] An abolition or modification of the rule in *Cohen v. S. McCord & Co. Ltd.* would have a similar effect. On the other hand, we believe that it would be a mistake to overemphasize the practical importance of this problem. The cases in which D2 resists a contribution claim on the ground that D1 was not truly liable to P are likely to be rare.

A point at which to start thinking about the question is to recognize that the principle of *res judicata* would not prevent D2 from contesting a finding made in the earlier litigation between P and D1 that D1 was liable to P, or that the amount of P's recoverable loss was not as it was found to be by the court that decided the case brought by P against D1.[4] The situation with which this section is concerned must be distinguished, then, from the case where P sues D1 and D2 as co-defendants, or where D2 is added as a third party in P's action against D1. In such circumstances, the court's apportionment of liability between D1 and D2 clearly is binding upon both of them for the purpose of determining their rights to contribution as between themselves.[5] The Commission sees no need to change the latter rule. Accordingly, we recommend that, if D2 was a party to the litigation between P and D1, or was

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[2] [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.) (subsequent references are to [1944] O.R.).

[3] See, in particular, *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, (1979), 106 D.L.R. (3d) 193. For a comment on this unsatisfactory area of the law, see Evans, "Federal Jurisdiction—A Lamentable Situation" (1981), 59 Can. B. Rev. 124. See, also, *Kraft v. The Queen in right of the Province of Ontario*, [1972] 3 O.R. 684, 29 D.L.R. (3d) 275 (H.C.J.) (main action instituted in jurisdiction where contribution not available), and *supra*, ch. 2, sec. 4(a). With respect to recent cases that would expand the jurisdiction of the Federal Court, see discussion *supra*, ch. 2, note 97.

[4] See *Inglis Ltd. v. South Shore Sales and Service Ltd.* (1978), 31 N.S.R. (2d) 562, at 567-68, 8 C.P.C. 58 (S.C., T.D.), rev'd on other grounds (1979), 31 N.S.R. (2d) 541 (S.C., App. Div.). See, further, Cheifetz, *Apportionment of Fault in Tort* (1981), at 116-20.

[5] See *Kirk v. Faugh*, [1951] O.W.N. 745 (H.C.J.).

joined as a third party, both she and D1 should continue to be bound by the findings of the court in that litigation.[6]

Despite the apparent absence of Ontario judicial authority directly on point, it may be noted that in *Marschler v. G. Masser's Garage*,[7] Lebel J. held that a claim for contribution made by D1, following a settlement that he had made with P, could not be defeated by an allegation by D2 that D1 had settled under the mistaken belief that he was liable to P. His Lordship interpreted the reference in section 3 of the *Negligence Act* to a "tort feasor" who had settled her liability with P to include a person who mistakenly believed herself to be liable. One might think, therefore, that a person who had paid P, following a judgment in which she had been held liable, would *a fortiori* not be debarred from recovering contribution, even if D2 could establish that the facts in *P v. D1* had been wrongly found, or that D1 had failed to raise a material legal defence to P's action.

The different wording of contribution legislation in other jurisdictions whose statutes are based upon the English *Law Reform (Married Women and Tortfeasors) Act, 1935*[8] diminishes the relevance of decisions in which courts have had to consider whether, in contribution proceedings brought by D1 against D2, D2 is able to challenge the findings made against D1 in the previous litigation that resulted in judgment against D1 in favour of P.[9] It would seem that the legislation in these jurisdictions does not enable D2 to defeat D1's contribution claim on the basis that D1 is not liable to P or that the court erred in assessing the quantum of P's loss *vis-à-vis* D1, although, bearing in mind the prevailing test for apportioning liability between wrongdoers, it has been held that the court may have regard to D1's conduct of the litigation with P in determining the amount of contribution to be awarded. In the Australian case of *Bitumen and Oil Refineries (Australia) Ltd. v. Commissioner for Government Transport*,[10] the High Court stated as follows:[11]

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[6] See Rules of Civil Procedure, O. Reg. 560/84, r. 29.05(2)(b) and (5), which makes determinations in the main action binding upon a third party whether or not a statement of defence to the main action was delivered.

[7] [1956] O.R. 328, 2 D.L.R. (2d) 484 (H.C.J.).

[8] *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30 (U.K.).

[9] In particular, s. 6(1)(c) of the 1935 Act provided that "any tortfeasor *liable* in respect of that damage may recover contribution...". It would have been difficult to argue that a claimant who had been held liable in the action brought against him by P was not "liable".

[10] (1955), 92 C.L.R. 200 (H.C.).

[11] *Ibid.*, at 212-13. See, also, *Inglis Ltd. v. South Shore Sales and Service Ltd.* (1978), 31 N.S.R. (2d) 562, 8 C.P.C. 58, at 64 (S.C., T.D.), where the defendants to a claim for contribution were said to be entitled to contest the quantum of damages awarded against the plaintiff in an earlier action by the injured person to which the defendants in the contribution action had not been joined as third parties. The decision was reversed on other grounds: (1979), 31 N.S.R. (2d) 541, 11 C.P.C. 127 (S.C., App. Div.).

> No doubt the Court...must accept the assessment [made in proceedings brought by P against D1] as conclusive as to the existence and the amount of the liability of the plaintiff claiming contribution [D1]. The Court, however, is required to find what is just and equitable as an amount of contribution having regard to the extent of the responsibility for the damage of the tortfeasor against whom the claim is made [D2]. There does not seem to be any valid reason why that tortfeasor may not say to the tortfeasor making the claim, if he has improvidently agreed to pay too large an amount or by unreasonable or negligent conduct in litigation has incurred or submitted to an excessive verdict, that the excess is due to his [D1's] fault and not to that of the tortfeasor resisting the claim [D2]. It would be a matter for the Court to consider under the heading of 'just and equitable'.

However, in *James P. Corry & Co. Ltd. v. Clarke*,[12] a claimant for contribution was held not to have established that he was a tortfeasor, who was as such entitled to contribution, merely by proving that he had submitted to a consent judgment in favour of P and had paid the amount due under it.

Section 29(1) of the Irish *Civil Liability Act, 1961*[13] specifically provides that D2 may not resist D1's claim "on the ground that the claimant who has paid the injured person was not liable to such person". However, the section also provides, among other things, that D2 "may resist the claim on the ground that he himself is not liable to such person and, for this purpose, may dispute any question of law or fact even though that question arises also on the liability of the claimant to the injured person; and the contributor may in the same way dispute the amount of the damage suffered by the injured person".[14]

There are several arguments in favour of an approach that would make any finding in *P v. D1* binding on D2 in a subsequent contribution action. First, to the extent that D1 has satisfied the judgment against her, she will have conferred a benefit upon D2—who, it should be re-emphasized, is liable to P—by removing or reducing that liability. Secondly, D1 cannot be said to have benefited D2 officiously, because the payment was made pursuant to a legal obligation. Thirdly, since D2 will be able to raise against D1's claim for contribution any defence that would have enabled her to defeat or reduce P's claim against her, she is not prejudiced by being bound by the outcome of litigation to which she was not a party-defendant, or, indeed, a third party. Finally, to prevent D2 from reopening the issue decided in *P v. D1* is an efficient use of judicial time and public funds, and since D2 would have had to pay P in any event, she is not substantially prejudiced by this extension of issue estoppel.

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[12] [1967] N.I. 62 (C.A.).

[13] *Civil Liability Act, 1961*, No. 41.

[14] Reference should also be made to the exception in s. 29(3) of the Act. Section 29(3) provides that D2 is estopped from "disputing the propriety or amount of the judgment obtained by the injured person on any question of law or fact common to [D1's] liability to the injured person and [D2's] liability to the injured person", if D2 "had knowledge of an action brought by the injured person against [D1], and unreasonably failed to make a

On the other hand, if D2 is not able to defend D1's claim for contribution by establishing that D1 ought not to have been held liable to P in the original litigation, then she will have been deprived of a defence that she could have raised if she had been brought into the original action as a party-defendant or by D1's service of a third party notice upon her, even though it might have been legally impossible to join D2 to P's action in either of these ways.[15]

The Commission has recommended in chapter 5 that, if D1 claims contribution after settling with P, D2 should not be able to defend the claim on the ground that D1 ought not to have settled because D1 was not liable to P. The purpose of this recommendation was to encourage settlements. However, the Commission has come to the conclusion that, in the present context, such a high value should not necessarily be given to the public interest in the finality of all issues decided in the litigation between P and D1. Rather, subject to one significant exception, we believe in the basic principle that a person should not be bound by an issue decided in an action to which she was not a party.

With respect to the existence of D1's liability to P—the central fact on which D1's right to contribution against D2 is predicated—the Commission favours an approach that would make the earlier finding against D1 conclusive in a subsequent contribution action. We see no policy justification for permitting D2 to open up the issue of D1's liability in that action. By hypothesis, D2 is liable to P. Accordingly, as a general proposition, the payment of money by D1 in satisfaction of her judgment debt to P confers a benefit on D2 (although the extent of the benefit depends on the quantum of P's loss, a matter to which we turn below). It would be unjust, therefore, to allow D2 to relitigate the issue of D1's liability. In this respect, then, we endorse the position taken in the Irish *Civil Liability Act, 1961*.

We also wish to adopt the principle enunciated in that Act in respect of D2's right to prove, in the contribution action, that the court erred in assessing the quantum of the injured person's loss in *P v. D1*. The Commission believes that there is an important distinction between relitigating the issue of D1's liability to P and relitigating the issue of quantum. As we have said, since D2 is, by definition, a wrongdoer, she is not prejudiced by being compelled to accept the fact of D1's liability. Such is not the case where the quantum of P's loss is in issue. Here, the inability to contest the earlier

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proposal for assisting [D1] in the defence of the action...". The reason for this provision is clear. It is to discourage the multiplicity of proceedings in respect of a single loss, although precisely what "assisting" in the defence of the action by the injured person is meant to encompass is not at all clear. It also bears mentioning that, under s. 29(3), D2 "shall not be so estopped where the claimant submitted to judgment in fraud of the contributor".

[15] The complications of the *Federal Court Act*, S.C. 1970-71-72, c. 1, provide the most obvious example: see text accompanying note 3, *supra*. Whether D1 ought to have known that D2 was a possible concurrent wrongdoer, or whether D2 deliberately concealed D2's potential liability, so that it was not practically possible for D2 to be joined to P's action, should not be regarded as decisive factors.

finding may be of critical importance to D2, who may wish to argue in the contribution claim that, since P's loss is actually less than that determined in *P v. D1*, not all of D1's payment to P has, in fact, benefited D2. Moreover, it bears emphasizing that, where P's judgment against D1 has not been satisfied or where P believes that her loss is more than the court held in her suit against D1, P may commence an action against D2. In such an action, the court would have to deal with the quantum of the damage suffered by P, obviously without reference to the results reached on the same issue in *P v. D1*. Accordingly, the Commission cannot see why that very issue ought not to be justiciable in the contribution action.

For the reasons advanced above, the Commission recommends that, where a claim for contribution is made in a legal proceeding independent of that in which judgment was awarded in favour of the injured person against the claimant for contribution, it should be no defence for the person against whom the claim for contribution is made to show that the court erred in holding the claimant liable to the injured person, except where the judgment was obtained by collusion or fraud.[16] We further recommend that this proposal should apply even where the judgment against D1 in favour of P was on consent. As a matter of principle, in this context we are of the view that there is no real distinction between a settlement—which, under our proposals, could not be opened up by D2—and a consent judgment.

However, insofar as the assessment of P's loss is concerned, we recommend that, in the independent contribution action, D2 should be entitled to show that the court wrongly assessed that loss in the earlier litigation between P and D1.[17] Accordingly, the sum to which D2 should be required to contribute should be determined by the court before which the contribution claim is made. Its decision will be made on the basis of the evidence admissible and introduced in that litigation, which, of course, may include evidence not available in the earlier action between P and D1. This is consistent with the principle that, if P herself had sued D2 at this time, such new evidence would be admissible.

If, in the contribution action, the court assesses P's recoverable loss as less than the figure determined by the court when P sued D1, then D1 may be required to pay a sum that exceeds her due proportion of the common liability as determined in *P. v. D1*. Thus, suppose that in P's action against D1, P's damages were found to be $10,000, but that when D1 subsequently claims contribution from D2, the court finds that the common liability of the concurrent wrongdoers was only $5,000. If D1 and D2 are found to be equally responsible for the loss, D1 will recover from D2 only $2,500. This result flows from a restitutionary analysis of contribution, because D2 will

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[16] See the Commission's proposed *Contribution and Contributory Fault Act* (hereinafter referred to as "Draft Act"), ss. 8(1) and 14(2). The proposed Act appears as an Appendix of this Report.

[17] Draft Act, s. 8(1).

have been unjustly enriched only to the extent that she has to bear less than half of the amount for which she was liable to pay P.

D2 will, of course, challenge the amount of the common liability only if she believes that judgment was given against D1 in P's action for too high a figure. Suppose, however, that D2 is mistaken, and that the court adjudicating the contribution claim decides that the common liability is greater than that found by the court that heard P's action? Assume that judgment had been entered for P against D1 for $10,000, but in the contribution action the common liability of the parties was found to be $15,000. D1 may argue that the contributable sum should be the higher figure. This, after all, was the sum for which D2 has been held liable, and that D1's payment to P has discharged: if D1 and D2 are found to be equally responsible for the loss, then D1 should recover half of the amount for which D2 has been held liable.

The argument on the other side is that D1 has already had an opportunity to litigate the amount of her liability in the action brought against her by P. It would not be unfair, therefore, to hold D1 to that determination, not only against P, but against D2 as well. D1 is not prejudiced by this result because she will be required to bear a part of the liability, as assessed in the action in which she was defendant, that is proportionate to her degree of fault. There is no reason why she should have a second chance of decreasing her ultimate share by trying to persuade a court that the judgment entered against her underestimated her liability. She should be no better off than she would have been if she had served a third party notice on D2 in the action brought against her by the injured person. Accordingly, the Commission recommends that the claimant for contribution should be estopped from asserting that her liability to P was greater than the figure at which it was assessed in P's action.

Finally, we recommend that, if the judgment in favour of P ordered specific relief against D1—such as the delivery of goods or performance of a service by D1—the court before which the claim for contribution is brought should be required to place a value on such delivery or performance in order to determine the amount of contribution recoverable.[18]

3. LIABILITY OF D2 TO P

(a) General

In this section, we shall examine the question whether it should invariably be a defence to a contribution claim that D2 was never liable to P for the loss in respect of which D1 has been held liable or has settled.

At one time, the common law doctrine of spousal immunity gave rise to an example of the contribution consequences of an initial immunity of D2

[18] *Ibid.*, s. 9(7).

from an action in tort by P.[19] Thus, if P was injured as a result of the negligence of her spouse (D2) and a third party (D1), should D1 be entitled to obtain contribution from D2 even though D2 could never have been sued successfully by P?[20] Another example, again now of historical interest only, was provided by the statutory provision that a gratuitous passenger in a motor vehicle who was injured in the course of the journey could only sue the owner or driver of the vehicle if it was established that the defendant had been guilty of gross negligence.[21] If the passenger's injury was caused by the negligence of a third party and the driver, should the third party be entitled to claim contribution from the negligent driver, even though the latter's conduct could not be characterized as so grossly negligent as to expose her to liability to the passenger?[22]

The Legislature has removed these problems by making the necessary reforms in the defective state of the law of primary obligation from which they arose. However, other statutory protections from liability still exist. One of the most important is contained in the *Workers' Compensation Act*,[23] which protects an employer from liability in tort to an employee who

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[19] The doctrine of spousal immunity to actions in tort has been abolished: *Family Law Act, 1986*, S.O. 1986, c. 4, s. 64(2). See, also, *infra*, note 20.

[20] In fact, s. 2(4) of the Ontario *Negligence Act*, R.S.O. 1970, c. 296, dealt with this problem by reducing the amount of damages recoverable by the injured person from the third party by an amount proportionate to the fault of the spouse whom the plaintiff could not sue. There was thus no need for any contribution claim against the wrongdoing, but immune, spouse. This section was repealed when spousal immunity was abolished in 1975: *The Family Law Reform Act, 1975*, S.O. 1975, c. 41, s. 7.

[21] *The Highway Traffic Act*, R.S.O. 1970, c. 202, s. 132(3). The much criticized limitation upon the injured person's right of recovery was repealed by *The Highway Traffic Amendment Act, 1977 (No. 3)*, S.O. 1977, c. 54, s. 16(1).

[22] Again, s. 2(2) and (3) of the Ontario *Negligence Act*, R.S.O. 1970, c. 296, "solved" the problem by reducing the damages otherwise recoverable by the injured person from the driver of the other vehicle by an amount proportionate to the fault or neglect of the immune driver of the vehicle in which the injured person was being carried. Section 1(2) of *The Negligence Amendment Act, 1977*, S.O. 1977, c. 59, repealed this restriction upon the *in solidum* liability principle when the requirement that the guest or passenger must establish gross negligence on the part of the host was abolished.

The repealed statutes—*The Highway Traffic Act*, R.S.O. 1937, c. 288, s. 47(2), and *The Negligence Act*, R.S.O. 1937, c. 115, s. 2(2)—had been described as "two of the most vicious pieces of legislation which an active insurance lobby was able to foist on an unsuspecting public": Anon., "Motor Cars and Gratuitous Passengers—Statutory Exemption from Liability of Car Owner Qua Owner—Liability as Master for Driver's Negligence" (1945), 23 Can. B. Rev. 344, at 347. This distaste was also shared to an extent by the courts, which were prepared to give the statutes a tortuous interpretation in order to limit the injustice that they were capable of causing: see Weiler, "Groping Towards a Canadian Tort Law: The Role of the Supreme Court of Canada" (1971), 21 U. Toronto L.J. 267, at 288-92, and Linden, *Canadian Tort Law* (1977), at 515-26.

For one of the last reported cases illustrating the operation of these provisions, see *Bates v. Illerburn* (1976), 12 O.R. (2d) 721, 70 D.L.R. (3d) 154 (C.A.).

[23] R.S.O. 1980, c. 539, s. 8(9). The Act contains a scheme of statutory benefits, and, to that extent, eliminates claims in tort against the employer of the injured worker in respect of injuries sustained in the course of the employee's employment.

has been injured in the course of her employment. If the employee's injury has been caused by the negligence of the employer and of a third party (the manufacturer of a defective tool with which the employee was working, for example), should the employer be able to defeat the third party's contribution claim by relying upon the employer's immunity to suit by the employee?[24]

Other contemporary illustrations of this problem are provided by a common law defence that D2, but not D1, may have against P. Suppose, for instance, that the promoters (D2) of a sporting event have, by the conditions of admission, successfully excluded their liability for injuries sustained by spectators as a result of D2's negligence. A spectator (P) is injured as a result of the negligence of one of the participants (D1) and the inadequate safety precautions taken by D2. If P successfully sues D1 in negligence for her injuries, should D1 have a right of contribution from D2, even though D2 had contractually exempted herself from liability to P? If the Commission's recommendation is adopted that a right of contribution may arise between parties whose liability to the injured person arose from an alleged breach of contract, then the relevance to the contribution claim of an exemption clause in the contract between P and D2 is likely to assume considerable practical significance.

A variation on the examples considered above is provided by the existence of a *partial* defence that may be available to D2, but not to D1, against the injured person. For example, D2's liability to P may be reduced because P was contributorily negligent *vis-à-vis* D2, a defence that will not necessarily be available against all other concurrent wrongdoers.[25] Alternatively, a term in the contract between D2 and P may limit the damages recoverable by P for a breach by D2 to a sum less than the amount that would otherwise have been recovered by P. Should either of these limitations on D2's liability to P be relevant to a claim for contribution made by D1 against D2?

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[24] The Ontario Legislature has once more foreseen the contribution consequences of the employer's immunity and has adopted a solution identical with that found in the repealed provision of the *Negligence Act*, discussed *supra*, note 22. Section 8(11) and (12) of the *Workers' Compensation Act*, *supra*, note 23, reduces the damages recoverable by the employee from the third party by the amount otherwise attributable to the employer, at least to the extent that the damages payable by the third party would have exceeded the statutory benefits recoverable by the employee.

For a recent survey of the variety of solutions to this problem that have been adopted in the United States, see Larson, "Third-Party Action Over Against Workers' Compensation Employer", [1982] Duke L.J. 483, at 484, where the issue is described as "the most evenly-balanced controversy in all of workers' compensation law".

[25] Contributory negligence is generally not considered to be a defence to a claim for damages for breach of contract, at least where the conduct cannot also be characterized as a tort. If it were, the problem raised in the text would be less likely to arise. See text accompanying note 72, *infra*. See, further, chapter 10 of this Report.

The concept of unjust enrichment upon which the law of restitution is based has been used so far in this Report as the principal organizing concept around which various aspects of the right of contribution among wrongdoers have been examined. Applying the same principle to the problems considered in this section would lead to the conclusion that if D2 always had a complete defence to an action brought by P, then this should inevitably defeat D1's claim for contribution. The reason for this is that if D2 was never liable to P, then any payment made to P by D1 in respect of P's loss conferred no benefit upon D2 because no liability owed by D2 was thereby discharged. On this reasoning, the precise nature of D2's defence to P's claim is irrelevant: it should make no difference whether the immunity arose from a contractual exemption clause, a defence based upon the conduct of the injured party (such as assumption of risk), or a statutory protection from liability. We have assumed that the fact that D1 has satisfied P's claim in full does not constitute a benefit to D2, even though it provides an additional reason why P would not institute proceedings against D2, which in any event would, *ex hypothesi*, not succeed.

Similar reasoning would apply if D2 has a partial defence, whether by virtue of P's contributory negligence or a limited liability clause. Arguably, D1 should not be able to claim from D2 by way of contribution a sum greater than that for which D2 could be held liable to P. Payment by D1 to P can only benefit D2 up to the amount for which D2 could have been successfully sued by P.

Matters may not, however, be quite this simple, particularly when the source of D2's immunity from suit by, or limited liability to, P is an exemption or limited liability clause in a contract. It can be argued that it is unfair to D1 that her *prima facie* right to claim contribution from a person whose wrongful conduct has contributed to P's loss should be jeopardized by a term in a contract to which D1 was not a party. While the cost to P of the contractual exemption may be reflected elsewhere in the contract with D2, D1 can in no sense be said to have purchased D2's immunity from liability to her. The argument might be put in a restitutionary framework by stating that D2's immunity is certainly a benefit conferred at D1's expense, but it has been conferred by P, who should therefore pay for it by a reduction in the damages that she can recover against D1. Indeed, this approach to the problem has found favour with the Ontario Legislature in some situations where D2 enjoyed an immunity as a result of the operation of a rule of common law or statute.[26]

These two ways of analyzing the consequences of the immunity from or limitation upon the liability of D2 to P permeate the concern to determine how a single loss, suffered by one party as a result of the concurrent wrongs of two or more other persons, should be distributed among them. As we have already had cause to note, the resolution of the problem ultimately depends upon some important policy choices and priorities.

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[26] See *supra*, notes 20, 22, and 24.

(b) THE PRESENT LAW

Section 2 of the *Negligence Act*[27] currently provides that "[w]here damages have been caused or contributed to by the *fault or neglect* of two or more persons, the court shall determine the degree in which each of such persons is *at fault or negligent*", and that the liability of such persons shall be apportioned by contribution or indemnity "in the degree in which they are respectively found to be *at fault or negligent*". Before an amendment made to the Act in 1935,[28] the section provided that contribution was available among those "found jointly and severally liable". Despite the apparent abandonment of the statutory requirement that a person from whom contribution is claimed must have been found *liable*, the courts have consistently held that a person who could at no time have been held legally liable for the loss sustained by the injured person is not liable under the *Negligence Act* to pay contribution.

In two cases decided before 1935, it was held that there was no right of contribution against a person whose careless conduct had undoubtedly caused the plaintiff's injury, because the person from whom contribution was claimed could not have been sued successfully by the claimant for contribution. In *Macklin v. Young*,[29] a claim for contribution was denied because of D2's common law defence of spousal immunity from suit by the injured person. A similar result was reached in *Wilson v. Hamilton Hydro-Electric Commission*,[30] where P's cause of action against D2 was barred by the *The Workmen's Compensation Act*.[31]

The deletion of the word "liable" from the *Negligence Act* in 1935 made it possible to argue that a person was required to contribute if her fault or neglect was a cause of P's injury, even though she could not be held liable to P in legal proceedings by virtue of a common law or statutory immunity. Nonetheless, in the overwhelming majority of cases, the courts have continued to hold that the liability of D2 to P is a necessary condition to D1's right of contribution.[32] Indeed, since section 2 provides that those found to be at fault or negligent are jointly and severally *liable* to the plaintiff, this is a

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[27] *Negligence Act*, R.S.O. 1980, c. 315.

[28] S.O. 1935, c. 46.

[29] [1933] S.C.R. 603. See, also, *McDonald v. Adams* (1932), 41 O.W.N. 145 (C.A.), and *Bird v. Armstrong*, [1950] 4 D.L.R. 824 (N.B.S.C., App. Div.), at 846. Similar results were reached in other Commonwealth jurisdictions: see, for example, *Chant v. Read*, [1939] 2 K.B. 346; *Drinkwater v. Kimber*, [1952] 2 Q.B. 281 (C.A.); *Walsh v. Fairweather*, [1937] N.Z.L.R. 855 (S.C.); and *Murphy v. Colbron* (1956), 73 N.S.W.W.N. 468 (S.C.).

[30] (1930), 40 O.W.N. 545, [1932] 3 D.L.R. 799 (H.C.J.). *Lappin v. Morrison* (1932), 41 O.W.N. 104 (H.C.J.) is one of the very few cases decided the other way.

[31] R.S.O. 1927, c. 179.

[32] See Cheifetz, *supra*, note 4, at 37-41.

reasonable conclusion. Thus, in *Cohen v. S. McCord & Co. Ltd.*,[33] Laidlaw J.A. said:

> 'Where two or more persons are found at fault or negligent'. . .does not change the construction which ought to be put on the enactment. Liability of two or more persons continues to be a condition precedent to the right of contribution and indemnity created by the statute.

This approach has been applied in cases where the *Workers' Compensation Act* excluded the liability to P of D2.[34]

It has also been held that the words "fault or neglect" are limited to breach of a legal duty that exposed D2 to a potentially successful suit by P. Thus, in *Cowle and Cowle v. Filion*,[35] a claim for contribution against the parent of a child (D2) who had been injured by D1 failed because D1 was unable to establish that D2 had been in breach of any *legal* duty of care owed to the child. A mere failure by D2 to discharge properly the moral obligation of parents to protect their child from injury was an insufficient basis upon which to build a claim for contribution.

The Supreme Court of Canada has affirmed that P's ability to recover damages from D2 is a condition precedent to a successful claim by D1 for contribution under the *Negligence Act*. In *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*,[36] a case in which a contractual exemption clause rendered D2 immune from liability at the instance of P, Laskin C.J.C. said:[37]

> I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss.

Giffels thus appears to have put the proper interpretation of this aspect of the *Negligence Act* beyond doubt. In addition, if there is at common law a

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[33] *Supra*, note 2, at 580.

[34] *Sinkevitch and Beaudoin v. Canadian Pacific Railway Co.*, [1954] O.W.N. 21 (H.C.J.). An amendment to what is now the *Workers' Compensation Act*, *supra*, note 23, reversed an earlier holding to the contrary in *Healy v. Runnymede Iron and Steel Co.*, [1941] O.R. 133, [1941] 3 D.L.R. 325 (C.A.).

[35] [1956] O.W.N. 881, 6 D.L.R. (2d) 258 (Co. Ct.). Compare *Peter v. Anchor Transit Ltd. and Turner* (1979), 100 D.L.R. (3d) 37, [1979] 4 W.W.R. 150 (B.C.C.A.), where a claim for contribution succeeded because the parent was held to have been in breach of a *legal* duty of care owed to the child. See, also, *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[36] [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 (subsequent reference is to [1978] 2 S.C.R.). See, also, *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1980), 29 O.R. (2d) 259, 112 D.L.R. (3d) 560 (C.A.).

[37] *Supra*, note 36, at 1354.

right of contribution among concurrent contract breakers who cause a single loss to the plaintiff—a point left open by the Supreme Court—it is probable that D2 would be able to rely upon an exemption clause in her contract with P in order to defeat D1's claim for contribution.

One other possibility should, however, be considered. Professor Glanville Williams, who regarded the courts' interpretation of the *Negligence Act* as unjust, has argued that the law of tort may, in some circumstances, provide D1 with a way of distributing to D2 part of the damages for which D1 was liable to P.[38] He argues that, even though D2 may have excluded by contract her liability to P, D2 may still be under a duty of care to D1, a duty that can include an obligation not to expose D1 negligently to a liability to P for which D1 is unable to claim contribution from D2. D1 may thus be able to claim as tortious damages whatever she had been required to pay P, less an amount that represents D1's proportionate fault. In such a case, a question might arise about the scope of the exemption clause in the contract between D2 and P. If it was drafted so as to exempt D2 from liability to P and to indemnify D2 with respect to any other claim that might be made against her arising from P's loss, then P would be required to indemnify D2 for the sum that D2 had been held liable to pay D1. P would thus not be able to retain the full amount of the damages recovered from D1.[39]

This possible method of redistributing to P the loss attributable to D2's wrongful conduct for which she could not be sued by P rests upon the law of tort, and will not be explored further in this chapter. The abolition of spousal immunity and of the requirement that gratuitous passengers could only recover from their driver if the latter were shown to be grossly negligent removed the principal sources of difficulty in this area of the law. The statutory bar provided by the *Workers' Compensation Act* will be discussed briefly below although, since this is an integral part of a special statutory regime of compensation, it would be inappropriate to make recommendations for its reform in this Report.

It is in the context of contractual exemptions or limitations of liability that the present law is likely to be most strenuously challenged, particularly, of course, if a statutory right to contribution is extended so that it includes all concurrent wrongdoers. Accordingly, this is the problem to which the remainder of this chapter principally addresses itself.

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[38] Williams, *Joint Torts and Contributory Negligence* (1951), at 115 and 425.

[39] This argument is based upon an analogy with *The Cairnbahn*, [1914] P. 25 (C.A.), a decision of the English Court of Appeal interpreting the *Maritime Conventions Act, 1911*, c. 57, s. 3(1). Williams argues that if D1 can establish a duty of care owed to him by D2 in accordance with general principles of the tort of negligence, and a breach of that duty, it should be irrelevant whether D1 has also suffered physical injury as a result of D2's negligence or whether D1's only damage is the economic loss involved in his having been held liable to compensate P for P's injuries.

(c) Alternatives for Reform

As long as the law allows parties to contract out of or limit their liability, or statutes exempt wrongdoers from liability, there would seem to be three principal methods of dealing with the contribution consequences.

(i) No Change in the Law

One possibility is to regard the present law as satisfactory and not in need of reform. Some of its strengths have already been indicated. The first is that it is consistent with the notion that the law of contribution is restitutionary in nature, and that rights of restitution are generally granted only for the purpose of preventing one person from retaining, without payment, a benefit conferred upon her by another in circumstances where the recipient of the benefit would thereby be unjustly enriched at the expense of the person who conferred it. Since D1's payment to P did not discharge a liability owed by D2 to P, D2 received no benefit from P's payment, and should therefore not be required to pay contribution. The fact that D1's payment to P may have persuaded P not to launch proceedings against D2—which, in any event, could not have resulted in a judgment against D2 in P's favour—does not constitute a "benefit" the conferral of which could support a restitutionary claim for contribution.

Secondly, to prevent D1 from passing on to D2 any of the liability for the payment made to satisfy P's claim is not necessarily unjust to D1: for one thing, D1 would have been liable in the same amount if she alone had caused P's loss, and for another, there is no reason why D1 should benefit from the existence of a stipulation in the contract between P and D2 for which D2 bargained with P. The price of the exemption clause may well be reflected elsewhere in the terms of the contract between P and D2; to allow D1 to claim contribution from D2 would be to give D1 a benefit for which she has paid nothing.

Thirdly, to allow the injured person to recover fully from the non-immune defendant, while protecting the immune defendant from suit, is consistent with one of the policies underlying a right to contribution, namely, that the plaintiff should not be able arbitrarily to select how a single loss should be distributed between two wrongdoers, *against both of whom* she had a cause of action.

A number of recent reforms of the law of contribution among wrongdoers appear to have retained the requirement that contribution may be claimed only if D2 was, at the time when P suffered the loss, at least potentially liable for it. Thus, section 1(1) of the English *Civil Liability (Contribution) Act 1978*[40] provides that a claim for contribution may be

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[40] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.).

made against any person who is or would if sued have been "liable in respect of the same damage". It would seem clear that this section was not intended to change the construction of the former legislation, the *Law Reform (Married Women and Tortfeasors) Act, 1935*,[41] which made D2's liability to P a condition precedent to a successful claim for contribution by Dl.[42] The 1978 Act does, as we shall see, modify the rule that Dl's claim to contribution is barred if D2 ceases to be liable to P *after* the damage has occurred. Indeed, the express provision in section 1(3) that a person shall be liable to make contribution "notwithstanding that he has *ceased* to be liable in respect of the damage in question since the time when the damage occurred" clearly assumes that there is no liability to contribute if D2 was *at no time* liable for the damage suffered by the injured person.[43]

Section 4(a) of the American Uniform Comparative Fault Act[44] limits liability for contribution claims to those "who are jointly and severally liable upon the same indivisible claim for the same injury, death, or losses, whether or not judgment has been recovered against all or any of them". Again, there seems little doubt that it would be a defence under this Act for D2 to establish that she was not and never had been liable to P, in the sense that P could never have obtained judgment against D2 for the loss in respect of which Dl has been held liable to, or has settled with, P.

The Report of the Alberta Institute of Law Research and Reform[45] does not expressly consider whether D2's potential liability to P should always be required before D2 can be held liable to contribute to Dl, but the discussion of the effect upon contribution of at least one factor that has caused D2 to *cease* to be liable to P certainly implies that, unless D2 had been liable to P at some time, contribution cannot be claimed from her.[46] Section 10 of the draft statute appended to the Report states as a basic principle that "a concurrent wrongdoer is entitled to contribution from any other concurrent wrongdoer". Section 1(a) defines "concurrent wrongdoers" as persons whose *wrongful* acts contributed to the same damage and

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[41] *Supra*, note 7.

[42] It is implicit in all the judgments in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, [1955] A.C. 169, [1954] 3 All E.R. 661 (H.L.) that there was no liability to contribute if D2 could never have been successfully sued by P.

[43] The English Law Commission's Report does not even discuss this issue: *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977). However, in its Working Paper (*Contribution*, Working Paper No. 59 (1975), para. 34, at 21), the Commission rejected the philosophy of the Irish *Civil Liability Act, 1961*, *supra*, note 13, which here, and elsewhere, throws the burden of D2's defence upon P by reducing the amount of damages that she can recover from Dl.

[44] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part). The Act was approved by the Commissioners in 1977.

[45] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979).

[46] *Ibid.*, at 62 *et seq.*

any other person *liable* for the wrongful act of any of those persons. Although these provisions do not, perhaps, put the matter beyond all argument, it would seem tolerably clear that they were not intended to extend liability to pay contribution to those who were never legally liable to the injured person. This interpretation is supported by section 11(2), which provides that a person whose liability to the injured person is limited by contract or statute cannot be required to pay contribution to D1 in excess of this sum. It would be extremely odd to give to D2 the benefit in contribution proceedings of a partial defence that she always enjoyed against P, but to deny D2 the benefit of a total defence.

The Law Reform Committee of South Australia has examined the problem, and has concluded that it is right to retain the present consequences for the law of contribution that flow from the fact that one of the "wrongdoers" has negotiated an exemption or limited liability clause with the injured person:[47]

> The Committee recognises that clauses limiting or excluding liability for breach of contract generally form part of carefully considered commercial agreements which are entitled to considerable respect and agrees with the principle...that the liability to contribute should not exceed the limits on liability established by prior contract or agreement between the plaintiff and a defendant.

(ii) Reduction of Damages of Injured Person

A different approach has been taken in the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada.[48] This Act provides that the damages recoverable by the injured party are reduced by the share of the responsibility that would otherwise have been borne by the concurrent wrongdoer whom the injured person cannot sue because of a clause in an agreement that excludes her liability to pay damages.[49] This approach of apportioning to the injured person the part of the loss that D2 would have had to bear *vis-à-vis* D1 if there had been no exemption clause in the contract between P and D2, had earlier been taken in South Africa[50] and Ireland. The origin of the relevant section of the Irish *Civil Liability Act*,

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[47] Law Reform Committee of South Australia, *Forty-Second Report of the Law Reform Committee of South Australia to the Attorney-General—Relating to Proceedings Against and Contributions Between Tortfeasors and Other Defendants* (1977), at 12.

[48] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*. See ss. 1(d) and 12(1) and (2). Section 11 provides for a similar solution in those instances of statutory exemptions from liability that provincial legislatures wish to include (for example, exemptions under workers' compensation legislation).

[49] See, further, text following note 58, *infra*.

[50] See the South Africa *Apportionment of Damages Act, 1956*, 1956 S.S.A., No. 34, s. 2(10).

1961,[51] section 35(1)(f), is a proposal by Professor Glanville Williams.[52] The section provides that

> where the plaintiff's damage was caused by two or more persons and such persons would have been concurrent wrongdoers were it not for a contract by the plaintiff with one of such persons before the occurrence of the damage exempting that person from liability, the plaintiff shall be deemed to be responsible for the acts of that person.

The attraction of this solution is that the injured party is made to pay for the presumed benefit that she has obtained by entering into a contract with an exemption clause. If the parties bargained from positions of relatively equal strength, then the injured party could be expected to have obtained the goods or services more cheaply than would have been the case had the supplier not excluded her contractual liability. To allow P both to recover in full from D1 (who cannot redistribute any of the loss to D2), and to have obtained D2's contractual performance at a discount is, it may be argued, to let P have her cake and eat it too.

Another advantage claimed for this solution is that it does not altogether deprive the plaintiff of the benefit of the existence of D1, who will normally be liable for at least part of the loss. Thus, if P's loss is $1,000, for which D1 and D2 would have been liable if D2 had not excluded her liability, then, on the assumption that *inter se* D1 and D2 would otherwise have borne it equally, P will recover $500 from D1. D1 also benefits from the presence of D2, because the liability that D1 would have had to bear if she had been the only "wrongdoer" is reduced by the amount that D2 would have had to pay if D2 had not bargained with P for her exemption from liability.

(iii) Exemption Clause No Defence to Contribution Claim

The converse of the present law has apparently been adopted in West Germany, which limits the effect of the exemption clause to the parties to the contract.[53] The result is that in proceedings by P against D2, the

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[51] *Supra*, note 13.

[52] Williams, *supra*, note 38, at 115, and Williams' Draft Bill, s. 25(1), *ibid.*, at 518. See, also, Larson, "A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party", [1940] Wis. L. Rev. 467, where the author states that, "where one tortfeasor has acquired the defense of assumption of risk as against the plaintiff, the plaintiff's recovery should simply be diminished by the amount of that tortfeasor's contributive share" (*ibid.*, at 499-500).

[53] See Weir, Int'l Enc. Comp. L. XI Torts (1983), ch. 12 (Complex Liabilities), at 52. This was also the view adopted by Lerner J. at first instance in *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1974), 3 O.R. (2d) 481 (H.C.J.), at 504-05, and supported by Cheifetz, "Recent Developments under the Ontario Negligence Act" (1977), 25 Chitty's L.J. 145, at 148 *et seq*. This decision was subsequently reversed by the Ontario Court of Appeal ((1976), 12 O.R. (2d) 201 (C.A.)), whose decision was affirmed by the

exemption clause provides D2 with an absolute defence, but its existence is ignored in a claim for contribution made against D2 by D1. This approach is based on the notions that it is unfair to D1 that a clause in a contract between P and D2, to which D1 was not a party, should destroy the right to contribution that D1 would otherwise have had against D2, and that P should benefit in full from the presence of D1, a wrongdoer who had not been exempted from liability to P.

(d) Conclusions

(i) Contractual Defences to Claims for Contribution

The Commission has concluded that, in the context of contractual defences to claims for contribution, neither the Irish Act's solution nor that adopted in West Germany provides a sufficient justification for modifying the principles that the plaintiff should not be prevented from recovering in full against one wrongdoer because of the existence of another, and that a person who could never have been held liable to P should not be made indirectly liable for the injured person's loss by being exposed to a claim for contribution. Both solutions are based upon a somewhat nebulous notion of "fairness" between D1 and D2, which runs counter to the more principled concept of unjust enrichment that underlies the restitutionary framework within which contribution is most easily accommodated. The price at which each scheme is prepared to purchase "fairness" is, in our view, unacceptably high.

a. Exemption Clauses

Two more specific objections may be raised against adopting, in the context of exemption clauses, a solution similar to that in the Irish Act, which, in effect, identifies the injured person with the "wrong" of D2 for which D2 cannot be sued by P. First, if we presume that P has given value for the exemption clause in order to obtain the goods or services supplied by D2 at a cheaper price than she would have otherwise had to pay, it is difficult to see why the price paid by P should be increased, beyond that for which P bargained with D2, by reducing the value of P's right of recovery against D1. If D1 wished to reduce or eliminate her liability to P, she, too, could have made a bargain with P in which she could have offered P some benefit in return for D1's immunity from liability.

Supreme Court of Canada in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, note 36.

As was suggested *supra*, this ch., sec. 3(b), there may already be situations where D1 could establish an action in tort against D2 and allege that her loss (including the sum in which D1 was liable to P and which D1 cannot recover by way of contribution), was a foreseeable consequence of D2's breach of a duty of care owed to D1.

Secondly, to analyze exemption clauses in terms of truly consensual bargaining is often totally unrealistic. The injured person may well not have fully appreciated the meaning and consequences of the exemption clause, nor may she have had any genuine opportunity to "bargain". Exemption clauses are often contained in "take it or leave it" standard form contracts, which are accepted by consumers who do not possess the necessary skills or time to "shop around" or to bargain for better terms. Viewed in this light, a decision to extend the effects of exemption clauses so as to reduce the injured person's rights against those who have wrongfully caused her loss, but with whom she has not agreed, even in a legally formal sense, to accept the exemption clause, seems quite retrogressive. It would be somewhat ironic if a reformed contribution statute were to add a new dimension to the effect of exemption clauses at a time when their operation between the parties to the contracts in which they are contained has given rise to critical comment.[54] It is far from clear why D1 should obtain a windfall in the form of a reduction of her liability to P.

The suggestion that the exemption clause should be disregarded in contribution claims is also open to the objection that it replaces restitutionary principles with a vague notion of fairness. Admittedly, this proposal, in attempting to solve a perceived unfairness in the way that the secondary rights and obligations of D1 and D2 are worked out, does not reduce the plaintiff's right to recover from D1 the full amount of her loss. It does, however, deprive D2 of the substance of her bargain with P by subjecting her to a potential liability to pay D1 a sum that might be 100 percent of P's recoverable loss. It seems unjustifiable indirectly to set aside a contract and to give D1 a windfall for which she had not paid. Accordingly, the Commission recommends that a person who, because of the existence of an exemption clause contained in a contract made with the injured person, could at no time have been successfully sued by the injured person should not be liable to pay contribution to another person in respect of the injured person's loss.[55]

b. Limited Liability Clauses

The existence of a contractual limitation upon the liability of one wrongdoer (D2) to compensate the injured party (P) produces difficulties in adjusting the contribution rights of D1 and D2 similar to those that arise when an exemption clause gives D2 a complete defence against P. There is, however, an important difference: because D2 has only a *partial* defence

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[54] See, for example, the Commission's *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), at 49, and its *Report on Sale of Goods* (1979), Vol. 1, at 227-34. See, also, the *Unfair Contract Terms Act 1977*, c. 50 (U.K.).

[55] Draft Act, s. 14(1)(a). It will be noted that s. 14(1)(a) is not limited to exemption clauses. Although, as indicated above, the issue arises primarily in the context of contractual exemptions of liability, the Commission is of the view that it should be a defence to a contribution claim that D2 could not, for any reason, be held liable to the injured person.

against P's claim for all the loss that she would have recovered had there been no limitation upon D2's liability, any payment made by D1 to P in respect of the loss will reduce or discharge D2's liability to P, and thus will have conferred a benefit upon D2. One of the essential elements for a restitutionary claim will therefore be present, and it is not disputed that D2 should be required to pay contribution up to the amount specified in the limited liability clause.

There are two issues that should be addressed here. The first concerns the apportionment among P, D1, and D2 of that amount of P's loss that exceeds D2's contractually limited liability. If this issue is dealt with in a manner similar to that proposed for total exemption clauses, then a second question will arise. This concerns the method of calculating the sum, up to the ceiling imposed by the limited liability clause, to which D2 should be required to contribute.

The arguments on the apportionment of any loss over and above the figure to which D2 had limited her liability are identical to those already considered in the case of a contract that effectively excludes D2's liability altogether. Thus, the present law, despite the absence of authority, would seem clearly to prevent D2 from having to pay to D1 a sum greater than that for which P could have successfully sued D2. Section 2(3) of the English *Civil Liability (Contribution) Act 1978*[56] expressly provides that where the damages payable by D2 to an injured person are "subject to any limit imposed...by [an] agreement made before the damage occurred", D2 shall not be required to pay by way of contribution a sum that exceeds the amount so stipulated. A similar recommendation has been made in the Report of the Alberta Institute of Law Research and Reform.[57]

The Canadian *Uniform Contributory Fault Act*[58] does not deal with this issue discretely. Section 12(2) provides that, following a release of one concurrent wrongdoer, the damages recovered by the injured person from another are to be reduced to the amount attributable to the fault of the person sued. This provision seems to apply to a contractually limited liability: section 12(1) states that section 12(2) applies to a release entered into *before or after* the injured person's damage occurred, and section 1 defines a "release" to include "a settlement or any other agreement limiting the liability of a person for damages, either in whole or in part".

The effect of the Act would thus seem similar to that produced by the Irish *Civil Liability Act, 1961*, which, consistent with its approach to total exemption clauses, identifies P with the amount of the loss she is prevented

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[56] *Supra*, note 40.

[57] *Supra*, note 45, at 72-73, Recommendation 15. See, also, The Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers*, Topic 5 (1984), at 37-39.

[58] *Supra*, note 48.

from recovering from D2 by virtue of D2's contractually limited liability. Thus, section 35(1)(g) of the Irish Act provides that

> where the plaintiff's damage was caused by concurrent wrongdoers and before the occurrence of the damage the liability of one of such wrongdoers was limited by contract with the plaintiffs to a sum less than that wrongdoer's just share of liability between himself and the other wrongdoer as determined under section 21 apart from such contract, the plaintiff shall be deemed to be responsible for the acts of that wrongdoer.

The operation of this provision can be illustrated as follows. Suppose that P has suffered a loss of $1,000 as a result of breaches of separate contracts by D1 and D2. D1 and D2 are equally at fault, but the contract broken by D2 limits D2's liability to P to $400. If P sues D1 who is found liable for the loss, judgment will be entered against D1 for $900: this figure is reached by subtracting from P's total loss the amount that D1 will be unable to recover by way of contribution from D2 because of the limited liability clause.

A third possibility, of course, would be to allow D2 to rely upon her limited liability in any action brought against her by the injured person, but not in a contribution claim by D1.[59]

The Commission prefers the first solution, which probably represents the present law, for reasons identical to those canvassed in the context of exemption clauses. It is recommended, therefore, that the existence of a limited liability clause should not reduce the damages recoverable by P from D1, and should enable D2 to use it to fix the maximum sum that D2 can be required to pay by way of contribution to D1.

As indicated, the second issue that arises when the person from whom contribution is sought has a *partial* defence to the injured person concerns the method of calculating the amount of D2's contribution. If D2 is liable to contribute only up to the amount of her contractually limited liability, how should the sum to which D2 is required to contribute be calculated? There seem to be three principal alternatives.

First, in calculating the liability to contribute of the wrongdoer (D2) whose liability to P is limited, the existence of the limitation could be ignored until a sum is claimed by D1 that is in excess of D2's liability to P. D2's liability to contribute would then be reduced to the contractual maximum, and any excess over that amount would be borne by D1. Thus, suppose that P has suffered a loss of $1,500 for which D1 and D2 are both liable and, *inter se*, equally responsible, but that D2's liability to P is contractually limited to $500. Under this proposal, the first step is to calculate D1's *prima facie* entitlement to contribution. On these facts it will be $750, that is, the damage caused by the wrongful conduct of D1 and D2 distributed between them in proportion to their respective degrees of fault.

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[59] Draft Act, s. 9(4)(b).

The second step is to see whether the resulting liability of D2 exceeds the sum for which she is liable to P. If it does, as is the case here, it must be reduced to that amount. The difference is then reallocated to D1. The extra $250 is thus borne by D1 alone: D1 bears $1,000 and D2, $500. The effect of D2's limited liability clause under this proposal is, therefore, that D1 cannot recover by way of contribution the $250 to which she would have been entitled if there had been no limited liability clause in favour of D2 in the contract between D2 and P.

If the hypothetical were changed, so that P's loss is only $400, then, if D1 is held liable for this sum, she is entitled to a contribution from D2 in the amount of $200. Suppose, though, that P's loss was $750. The solution advanced here would entitle D1 to recover from D2 a contribution of $375. This result is fair if the most important consideration is that D1 and D2 should bear the loss according to their respective degrees of fault up to the maximum of D2's liability to P.

This solution was favoured by the English Law Commission[60] and by the Alberta Institute of Law Research and Reform.[61] However, neither the English *Civil Liability (Contribution) Act 1978*[62] nor the Canadian *Uniform Contributory Fault Act*[63] contains an express provision to this effect, perhaps because it was thought to be the law already.[64]

The objection to this method of distributing the loss between D1 and D2 is that where P's loss is more than the contractual limit of D2's liability, it requires D2 to bear a portion of *her* liability ($500 maximum) that exceeds her share of fault (50 percent). For example, where P's loss is $750, D2 would be required to pay $375—less than her $500 maximum but more than 50 percent of that maximum amount. It may be noted that a similar objection was disregarded by the Supreme Court of Canada in a rather different context. In *Burkhardt v. Beder*,[65] the plaintiff claimed $20,000 in general damages from the defendant in an action brought under *The Fatal Accidents Act*.[66] The jury found the defendant liable and the deceased 50 percent contributorily negligent. The jury assessed general damages at $26,000 and the trial judge entered judgment for the plaintiff for $13,000,

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[60] See Working Paper, *supra*, note 43, paras. 49-51, at 29-31, and subsequent Report, *supra*, note 43, paras. 70-74, at 20-21.

[61] See, generally, *supra*, note 45, at 72-73, and esp. at 73, Recommendation 15.

[62] *Supra*, note 40.

[63] *Supra*, note 48.

[64] See *Unsworth v. Commissioner for Railways* (1958), 101 C.L.R. 73 (H.C.), and *Plant v. Calderwood*, [1969] N.Z.L.R. 752 (S.C.), rev'd on other grounds [1970] N.Z.L.R. 296 (C.A.).

[65] [1963] S.C.R. 86, 36 D.L.R. (2d) 313.

[66] R.S.O. 1960, c. 138.

plus half of the funeral expenses. The plaintiff's request to amend the statement of claim following the jury's verdict was refused by the trial judge, whose decision on this point was upheld by the Court of Appeal. The Supreme Court upheld the jury award, without, however, having to deal with the question whether the amendment should have been allowed. Provided that the sum awarded did not exceed the sum claimed by the plaintiff, the plaintiff was entitled to recover her actual loss as found by the jury, less the sum attributable to the deceased's own fault. The fact that this meant that the defendant was liable to pay more than half of the sum for which the defendant could have been held liable, even though he was only 50 percent at fault, was not regarded as objectionable.

A second approach to calculating liability is to determine the extent of D2's liability to contribute on the basis only of the amount of common liability between D1 and D2. In other words, regard is had to the limitation upon D2's liability to P *before* an apportionment is made between D1 and D2. Under the first alternative, on the other hand, the existence of the limitation is disregarded until *after* the apportionment is made, when its only effect is to reduce D2's liability to an amount that is no greater than the maximum sum to which D2 has contractually limited her liability to P.

Because, in each of the examples considered above, D2's maximum liability to P is $500, the common liability of D1 and D2 is $500; therefore, since each is equally at fault, D2 can never be required to contribute more than $250 to D1. Of course, if P's loss is less than $500, D2's share will only be half of P's actual loss. The result of this proposal is that if P's loss is $1,000, D1 must bear $750 and D2, $250; and if P's loss is $10,000, D2 will still only be required to contribute $250, the remaining $9,750 falling upon D1.

The merit of this scheme is that it gives to D2 the full benefit of the presence of another wrongdoer, D1, and allows D2 the total, logical advantage of the limited liability for which she has bargained with P, presumably at the cost of a reduction in the price paid for the goods or services supplied or rendered under the contract. The reason why D1 is bound to bear a higher portion of the loss suffered by P is because D1 has not bargained with P for a limitation upon her liability.

However, the result reached seems unduly harsh on D1, who obtains little benefit from the presence of D2; D1 may be required to bear a portion of the total liability to P far in excess of her share of fault. To increase D2's portion up to her contractually limited liability—as under the first alternative—would not expose D2 to a loss against which she had protected herself by her contract with the injured person.

A third method of apportioning the loss seeks to avoid the extremes of the first two alternatives and to ensure that D2's limited liability to P is respected in contribution proceedings by confining D2's liability to contribute to a proper proportion of the greatest sum that P could have recovered

from her. It has been suggested[67] that any satisfactory basis for apportionment should ensure that the wrongdoers benefit proportionately from the presence of each other. According to this proposal, if P's loss is $750, D2's limited liability is $500, and D1 and D2 are equally at fault, then the amount of contribution should be calculated as follows:[68]

$$\text{D1's share would be } \frac{750}{750 + 500} \times 750 = 450$$

$$\text{D2's share would be } \frac{500}{750 + 500} \times 750 = 300$$

A further refinement of the formula would be required if D1 and D2 were not equally at fault.

A fourth alternative is to leave the calculation of the amount to be contributed by the parties to the discretion of the court, subject to a provision that a person should never be required to contribute a sum greater than that for which she could have been successfully sued by the injured party. This seems to be the choice made in the United Kingdom. Section 2(1) of the *Civil Liability (Contribution) Act 1978*[69] states that, subject to the limitation just mentioned,

> the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

This section is of general application with respect to all claims for contribution made under the Act. How the courts will apply it when one party's liability to the injured person is contractually limited is unclear. The section might be construed to mean that each wrongdoer is liable to contribute in proportion to her degree of fault (or causation) up to the contractual limit. This would mean that the first alternative discussed above had been adopted. But the words "damage in question" could mean the damage for which both are liable in common; if this were the case, then the section would have embodied the second alternative.

Apart from its ambiguity, the English solution of leaving the matter to judicial discretion is not recommended. The problem presents a clear choice between two competing principles that can appropriately be made by the

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[67] Weinrib, "Contribution in a Contractual Setting" (1976), 54 Can. B. Rev. 338, at 345-46, esp. *n*. 34. The first alternative, Professor Weinrib argues, is unduly harsh on D2 because it gives too little weight to her limited liability and may require her to bear a portion of the loss that is well in excess of her share of fault. The second alternative, in his view, is objectionable because it unduly penalizes D1.

[68] The formula is adapted from that used to apportion liabilities in certain insurance contexts.

[69] *Supra*, note 40.

Legislature. The choice is between the principle that those whose wrongful conduct has injured another should bear the cost of compensation in proportion to their respective degrees of fault (up to any contractual limit), and the principle that a person who has limited her liability by contract should be entitled to benefit from the clause in contribution proceedings both within and beyond the amount so stipulated.

The Commission has concluded that the first of these principles is to be preferred. There is much to be said for the proposition that if D1's payment to P confers a benefit upon D2, as it will until it exceeds the contractually fixed maximum of D2's liability to P, then D1 should not be prejudiced by the terms of the contract between D2 and P. Moreover, at a time when a more critical view is being taken of exemption and limited liability clauses, especially those contained in standard form consumer contracts, it may seem somewhat odd to endow them with an added vitality by giving limited liability clauses an efficacy against a third party (D1) that is not clearly justified by the parties' expressed intentions. D2 has, after all, contemplated that she may be liable up to the stipulated limit. In this context, therefore, justice would seem to require allocation on the basis of comparative fault up to the point that D1's payment actually benefits D2. Accordingly, the Commission recommends that the fact that a wrongdoer's liability to the injured person is limited should be ignored for the purpose of calculating the amount that she is liable to pay by way of contribution, except for the purpose of ensuring that her liability to contribute does not exceed the amount in which her liability to the injured person was limited.[70]

(ii) Non-Contractual Defences to Claims for Contribution

We have so far considered the effect upon a contribution claim of a total or partial defence available to one wrongdoer by virtue of the terms of a contract with the injured party. In other cases, however, one party may, as a result of the operation of a general rule of law, either be wholly immune from liability or have a partial defence to P's claim for damages. Spousal immunity and the gratuitous passenger rule, mentioned earlier in this chapter,[71] provided a common law and a statutory example. Two familiar contemporary examples are the partial defence of contributory statutory negligence and the statutory bar in the *Workers' Compensation Act* on an employee suing her employer for an injury sustained in the course of employment. This Act prescribes the contribution consequences of the immunity, but other statutes may not.

The question considered here is whether the reasoning and recommendations of the earlier parts of this chapter are equally applicable to non-contractual defences that one wrongdoer may have to an action brought against her by the injured person. One possibility, of course, is that not all

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[70] Draft Act, s. 9(5).

[71] See text accompanying notes 19-22, *supra*.

non-contractual defences should be treated in the same way, and that while the recommendations made earlier in respect of contractual defences should apply to some non-contractual defences, they ought not to be applied to others.

a. Contributory Negligence

The operation and scope of contributory negligence upon the liability of a wrongdoer to the injured person is considered in chapter 10 of this Report. The aspect of the defence that is relevant to this chapter is its effect upon rights of contribution between concurrent tortfeasors who are liable for a single loss suffered by P, but where the damages recoverable by P against one concurrent wrongdoer (D2) will be reduced because of P's contributory negligence. As with the limited liability problem considered earlier, the issue is how best to distribute the loss among defendants whose liability to the injured person is in different amounts. Suppose, for instance, that P has been injured as a result of a collision between P's car and a vehicle negligently driven by D2. P's own carelessness is found to have been greater than that of D2, so that of P's $1,000 loss, she can only recover $300 from D2. However, P is able to prove that the accident was also caused by a defect in her brakes, which D1 had undertaken to correct, but did not. If D1 would otherwise be liable for breach of contract to P for $1,000, what effect should P's contributory negligence *vis-à-vis* D2 have upon P's recovery against D1, or how should it affect D1's right of contribution against D2?

At present, contributory negligence is not a defence to a purely contractual claim; if, as the Commission has recommended, a right of contribution is extended to all concurrent wrongdoers, irrespective of the legal characterization of their wrong, then courts are likely to have to deal with this problem more regularly than they have so far. However, any extension of the availability of contributory negligence as a partial defence (to breach of contract, for example) would reduce the potential contribution difficulties, since, under the new regime, there would be fewer cases in which the liability of each of the concurrent wrongdoers to P differs.[72]

There are three principal approaches to resolving the contribution problem that arises where one concurrent wrongdoer's liability is reduced by the plaintiff's contributory negligence, but the other's liability is not. First, the amount recoverable by P from D1 could be reduced so as to represent only the degree of fault that, as among P, D2, and D1, is fairly attributable to D1's conduct. This is the solution adopted by the Irish *Civil Liability Act, 1961*.[73] Under the second approach, P could recover in full against D1, but in proceedings for contribution the fact that P's carelessness reduced the quantum of D2's liability would be ignored. Thus, D1 would

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[72] See, further, chapter 10 of this Report.

[73] *Supra*, note 13. The Act does so by providing, in s. 38(1), for apportioned judgments, and departing from the principle of *in solidum* liability.

recover contribution on exactly the same basis as if D2 had not had a partial defence to P's claim. Finally, P could recover in full against D1, and D2 would never be required to pay contribution to D1 in a sum greater than the amount recoverable from her by P. This approach represents the present law, and has been specifically adopted in section 2(3)(b) of the *Civil Liability (Contribution) Act 1978*[74] in the United Kingdom.[75]

If the third alternative is accepted, then, as discussed earlier in the context of limited liability clauses, there are several bases upon which contribution could be calculated up to the maximum of D2's liability to P. First, the fact that D2 is liable to P for a smaller sum than D1 might be ignored until the application of the normal apportionment principles results in D2's paying more than she was liable to pay P. Secondly, the amount for which D2 is liable to P could be regarded as the parties' common liability, and an apportionment made on the basis of that figure. Thirdly, some compromise between these two approaches might be made that better ensures that both D1 and D2 benefit proportionately from the presence of the other wrongdoer. Fourthly, the issue might simply be left to the exercise of judicial discretion on a case-by-case basis.[76]

The Commission has come to the conclusion that P's right to recover in full from D1 should never be prejudiced by the fact that there is another wrongdoer (D2) liable to P, even if P's contributory negligence *vis-à-vis* that person has reduced the amount that P can claim from D2. Nor should D2 be required to contribute a greater amount than that for which she was liable to P: any payments made by D1 to P that exceed this sum confer no benefit upon D2. Subject to this limitation, it is recommended that P's loss should

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[74] *Supra*, note 40.

[75] The Law Reform Commission of Hong Kong "declined" to make a recommendation along these lines: *supra*, note 57, para. 8.11, at 43. Neither the Alberta Institute's Report nor the *Uniform Contributory Fault Act* specifically deals with this problem.

In *Unsworth v. Commissioner for Railways*, *supra*, note 60, it was held that s. 5(c) of the Queensland *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952*, No. 42 (found in Queensland Statutes 1828-1962, Vol. 20), which provided that contribution could be recovered from any other tortfeasor liable in respect of the same damage, implicitly prevented D1 from recovering from D2 a sum greater than its statutorily limited liability. See, also, *Plant v. Calderwood*, *supra*, note 64.

Section 2(3)(a) of the English *Civil Liability (Contribution) Act 1978*, *supra*, note 40, also provides that D2 is not liable to contribute beyond a limitation "imposed by or under any enactment" upon his liability to the injured person. Although the earlier legislation had not expressly dealt with this matter, the courts had reached the same result: *Acrecrest Ltd. v. W.S. Hattrell and Partners*, [1983] Q.B. 260, at 281, [1983] 1 All E.R. 17 (C.A.), overruled on other grounds by *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1985] 1 A.C. 210, [1984] 3 W.W.R. 953 (H.L.).

[76] This seems to be the solution adopted by the English *Civil Liability (Contribution) Act 1978*, *supra*, note 40, s. 2(1) and (3)(b).

be distributed between D1 and D2 without regard to the fact that D2 is liable to P for a lesser sum than D1.[77]

The reasons for these recommendations are substantially similar to those considered in the context of contractually limited liability, and will not be reiterated. An additional reason exists, though, for protecting D2 from a contribution claim that exceeds D2's liability to P: this is that the reason for D2's reduced liability is the result of P's conduct, and not an agreement to which D1 was not a party. D1 is unable to argue that it is unfair that she should be prejudiced by a contract between P and D2. Moreover, although P is at fault, if this is insufficient to reduce D1's primary liability to P, there seems no reason why this result should be reached indirectly by reducing it in order to achieve "fairness" as between D1 and D2. In no sense can P be said to have conferred a benefit upon D2.

b. Other Defences

The most practically important statutory immunity to suit in Ontario is provided by the *Workers' Compensation Act*,[78] which bars a suit against an employer by an employee who is injured in the course of employment in circumstances that give rise to a statutory claim for compensation. The injured worker, however, may have a claim against a third party whose wrongful conduct also caused the injury. The Act deals with the distribution of the loss among the worker, the employer or the compensation fund, and the third party, by reducing the damages recoverable against the third party to a sum that represents the portion of the fault attributable to the third party. This is a statutory abrogation of the normal principle that a wrongdoer is liable *in solidum* for any loss caused by her conduct and that of another person, and is a legislative adoption in this one context of the principle permeating the Irish *Civil Liability Act, 1961*, namely, that the injured person should be identified with the wrongdoer whose liability is legally limited or removed. No question of contribution therefore arises between the third party and the employer or the compensation fund.

This interpretation of the *Workers' Compensation Act* has recently been affirmed in *DiCarlo v. DiSimone*.[79] In that case, the injured person sued a fellow employee and their employer, and the owner of a second vehicle that had collided with the vehicle in which the plaintiff was travelling with his co-employee. The action against the first two defendants was dismissed on the ground that the Workers' Compensation Board had ruled that the accident had occurred in the course of the injured worker's employment, and was therefore covered by the statutory compensation scheme. Having elected to

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[77] Draft Act, s. 9(4)(a). See, also, s. 9(5). This was the recommendation of the English Law Commission Report, *supra*, note 43, para. 77, at 22, but it was not incorporated into the Act.

[78] *Supra*, note 23.

[79] (1982), 39 O.R. (2d) 445, 140 D.L.R. (3d) 477 (H.C.J.).

sue the third defendant, rather than claim under the Act, the plaintiff could only recover damages against the third defendant that were proportionate to that party's share of the fault. In the event that the third defendant was held liable, he could not subsequently claim contribution from the first two defendants.

It will be recalled that Ontario adopted a similar policy in respect of both spousal immunity and the gratuitous passenger who was injured by the negligence of both the person in whose care she was travelling and a third party.[80]

It is not proposed to consider the merits of the provisions of the *Workers' Compensation Act*. These provisions are part of a comprehensive statutory scheme for compensating those injured at work, and properly fall outside the scope of the more general subject of this study. Suffice it to state that no recommendation made in this Report is intended to affect in any way the *Workers' Compensation Act*.[81] For the reasons already given, however, it is not recommended that this scheme should be generalized so as to reduce the liability of one wrongdoer to the injured person because another wrongdoer enjoys some partial or total statutory defence to a claim by the injured person. The Commission, therefore, does not recommend accepting the invitation apparently made by the Canadian *Uniform Contributory Fault Act*, which, in section 11, contemplates that the principle of identification adopted in workers' compensation legislation should be applied more generally to other statutory immunities. If the Legislature subsequently wishes, in particular instances, to depart from the general recommendation of the Commission, it should do so specifically.

Recommendations

The Commission makes the following recommendations:

1. Where the injured person sues both the claimant for contribution and the person against whom the claim is made as co-defendants in a single action, or where, in the injured person's action against the claimant alone, the contributor is added as a third party by the claimant, both the claimant for contribution and the contributor should be bound by the findings of the court in that action.

2. (1) Where a claim for contribution is made in a legal proceeding independent of that in which judgment was awarded in favour of the injured person against the claimant for contribution, it should be no defence for the person against whom the claim for contribution is made to show that the court erred in holding the claimant

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[80] See *supra*, notes 19-22 and accompanying text.

[81] See Draft Act, s. 23(2).

liable to the injured person, except where the judgment was obtained by collusion or fraud.

(2) The recommendation in paragraph (1) should apply even where the judgment against the claimant in favour of the injured person was on consent.

(3) (a) In the independent contribution action, the person against whom the claim for contribution is made should be entitled to show that the court wrongly assessed the quantum of the injured person's loss in the earlier action between the injured person and the claimant for contribution. Accordingly, the sum to which the contributor should be required to contribute should be determined by the court before which the contribution claim is made.

(b) However, the claimant for contribution should be estopped from arguing that the injured person's loss was greater than the amount at which that loss was assessed by the court that decided the injured person's action against the claimant.

(4) If the judgment in favour of the injured party ordered specific relief against the claimant for contribution—such as the delivery of goods or the performance of a service by the claimant—the court before which the claim for contribution is brought should be required to place a value on such delivery or performance in order to determine the amount of contribution recoverable.

3. A person who could at no time have been successfully sued by the injured person should not be liable to pay contribution to another person in respect of the injured person's loss.

4. A person whose liability to the injured person is less than that of another wrongdoer because of a contract made with the injured person before the cause of action arose, the contributory fault of the injured person, a statute, or any other reason, should never be required to pay by way of contribution a sum that exceeds the amount of her liability to the injured person.

5. The fact that a wrongdoer's liability to the injured person is limited should be ignored for the purpose of calculating the amount that she is liable to pay by way of contribution, except for the purpose of ensuring that her liability to contribute does not exceed the amount in which her liability to the injured person was limited.

6. No recommendation made in this Report is intended to affect in any way the *Workers' Compensation Act*.

CHAPTER 7

DEFENCES TO CONTRIBUTION CLAIMS: SUBSEQUENT IMMUNITIES

1. INTRODUCTION

The last chapter considered principally the effect upon rights of contribution of a complete or partial defence available to one wrongdoer against the claim of the injured person. A common feature of those defences is that they limit or exclude liability from the time the injured person suffered the loss or his cause of action accrued. In this chapter, we consider situations in which the person from whom contribution is claimed (D2) was at one time liable to compensate the injured person (P), but where subsequent events have rendered D2 immune from suit. The question is whether a concurrent wrongdoer (D1) who has compensated P is entitled to claim contribution from D2, even though D2 has ceased to be liable to P.

The three contexts in which this issue is most likely to arise are as follows. First, different time limitation periods may govern the enforcement of P's rights against D1 and D2. In the substantial number of cases in which this problem has arisen, the difficulty has been caused by differing statutory limitation periods, but if the recommendations in this Report are implemented, then the effect of a contractually limited time for suing may also have to be considered.[1] Secondly, D2 may have become immune from proceedings instituted by P because P has already sued D2 and has lost. Should this bar a subsequent contribution claim by D1 who settles with or is successfully sued by P after judgment has been given in D2's favour against P?

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[1] In *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344, aff'ing (*sub nom. Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.*) 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A.), rev'ing (1974), 3 O.R. (2d) 481, 46 D.L.R. (3d) 28 (H.C.J.), the Supreme Court of Canada held that D2 could not be required to contribute in respect of a liability of D1 to P for which D2 was not liable to P because the fault in the construction had appeared outside the contractually limited period of the guarantee. This, it is suggested, is a rather different case because, on the facts, D2 was at no time liable to P for the loss he sustained. This problem is, therefore, more properly considered as an exemption clause case.

Since the limitation period for breach of contract runs from the time when the breach occurred, whereas in tort it runs from the time when the plaintiff suffered his loss, the extension of the right of contribution to concurrent contract breakers may increase the frequency with which the problems considered in the text will arise.

The third situation has already been encountered, and was examined in chapter 5 of this Report, where the effect upon contribution claims of a settlement between a wrongdoer and the injured person was considered. The Commission recommended that, even though a person had finally settled *his* share of the liability with P, if the settlement did not discharge other concurrent wrongdoers' liability, they should be entitled to claim contribution against the settling wrongdoer who settled for less than his fair share of the total liability.[2] One objection to this conclusion was that since the settling wrongdoer could not be sued by P, a later payment by D1 to P conferred no benefit upon D2, and therefore should not support a claim for contribution.

Throughout this Report, we have emphasized the restitutionary nature of contribution claims and the importance of the concept of unjust enrichment as a rationalizing principle. However, a rigorous application of this approach may seem a less satisfying solution to the difficult problems considered in this chapter. The argument would be that a contribution claim should only be permitted if a payment, or its equivalent, by one wrongdoer to the injured party conferred a benefit upon another wrongdoer. Thus, if at the time that the payment was made by D1 or D1 was held liable to P, the other wrongdoer (D2) could not be successfully sued by the injured party, then no part of D1's payment should be recoverable, because it conferred no benefit upon the immune wrongdoer. It does not matter for the purpose of this argument precisely why the wrongdoer from whom contribution is claimed (D2) is immune from suit by the injured party, whether it is because the limitation period has expired within which P's rights against D2 must be enforced, or because P has already unsuccessfully sued D2 so that the question of D2's liability to P is *res judicata*, or because P has released D2 from whatever claim he might have had against him.

It ought to be emphasized for the sake of clarity that this analysis does *not* assume that D1's right to contribution arises when P sustains his injury or when P's cause of action against the wrongdoers accrues. Thus, in the case of limitation periods, the argument is *not* that if P commences proceedings against D1 at a time when P could no longer sue D2, D1's claim for contribution must fail because *the limitation period governing the right to contribution* runs from the time when P was injured. It is well established that a contribution claim is a cause of action that is independent of P's cause of action:[3] the right to contribution is generally thought to arise when D1 has paid—or done something equivalent—a sum greater than his due share of the common liability to P of the concurrent wrongdoers.[4]

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[2] *Supra*, ch. 5, sec. 3(c)(iii).

[3] For a recent affirmation of this principle by the Supreme Court of Canada in the context of federal jurisdiction, see *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193.

[4] This is so in the case of sureties and other co-debtors: Williams, *Joint Obligations* (1949), at 167-69, and Goff and Jones, *The Law of Restitution* (2d ed., 1978), at 215-17. There is no reason to suppose that any different principle should generally apply to the statutory

Rather, the question is whether a payment by D1 to P that confers no benefit upon D2, because D2 could not *at that time* have been legally required to compensate P, is or should be capable, as a matter of substantive law, of giving rise to a claim for the restitutionary right to contribution. The expiry of the limitation period governing the enforcement of P's rights against D2 is thus relevant because it prevents D1's payment from conferring a benefit upon D2 by discharging a liability enforceable against him by P. Determining what limitation period should govern the contribution claim itself, once it has arisen, is a different question, and is considered in chapter 9.

Despite the logical attractiveness and simplicity of this restitutionary argument, it lacks the compelling quality that a strictly restitutionary analysis has when applied to situations in which D2 could at no time have been successfully sued by P. For it is difficult to resist the thought that, in a very real sense, D1 acquires at least an inchoate right to contribution when P's loss is sustained, and that this right should not be destroyed by subsequent events over which D1 has no control.[5] It may be argued that it is unfair that P should be able to defeat D1's right by delaying the institution of

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right of contribution among tortfeasors created by the Ontario *Negligence Act*, R.S.O. 1980, c. 315, although, by virtue of s. 6, a third party notice may be served upon D2 before D1's liability to P has been established in the main action. Indeed, this was made clear in *Nesbitt v. Beattie*, [1955] O.R. 111, [1955] 2 D.L.R. 91 (C.A.). However, in some cases it has been stated that the right to contribution arises when the tort is committed: *Glass v. Avenue Dodge Chrysler* (1979), 26 O.R. (2d) 592, 10 C.C.L.T. 69 (Co. Ct.) is a recent illustration to this effect. For a criticism of the reasoning in this decision in which the relevant authorities on this point are cited, see the annotation by Cheifetz in (1979-80), 10 C.C.L.T. 70.

See, also, *Ronex Properties Ltd. v. John Laing Construction Ltd.*, [1983] Q.B. 398, [1982] 3 All E.R. 961 (C.A.) (subsequent reference is to [1983] Q.B.), where it was held that the *actio personalis* rule applied only to claims in tort, and not to a claim for contribution that arose against a concurrent tortfeasor in favour of a person who had been held liable to the plaintiff in tort. Sir Sebag Shaw said (at 407) that the statutory right to contribution is not tortious in nature, but

> derives from a liability in tort to some third party who could have sued any or all of the tortfeasors concerned. As between them, a claim for contribution resembles a claim by a plaintiff for money paid by him to the use of the defendant who has been relieved pro tanto of his direct liability to the victim of the tort.

[5] The "inchoate right" theory is advanced in Larson, "A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party", [1940] Wis. L. Rev. 467, at 473-77. In *Camp v. Bostwick*, 5 Am. Rep. 669 (1870), at 693, an inchoate right to contribution was said to arise from the very existence of the relationship between co-sureties:

> This equity having once arisen between co-sureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden.

See, also, Weinrib, "Contribution in a Contractual Setting" (1976), 54 Can. B. Rev. 338, at 347, who states that the problem is to determine the scope of protection which should be given to D1 from "the snuffing out of his existing rights by other parties".

proceedings against D1 until the time within which he had to sue D2 has expired, and that P and D2 should defeat D1's claim by a settlement, release, or waiver of D2's liability, or by the result of litigation between P and D2.

To permit P, without penalty, to delay proceedings against D1 until P can no longer enforce his rights against D2, thereby denying D1 a right to contribution, seems to revive one of the vices of the old rule in *Merryweather v. Nixan*:[6] it would give P an unjustifiable power to choose which of the wrongdoers will ultimately bear the loss. To bar D1 from claiming contribution because D2 has already been unsuccessfully sued by P burdens D1 with the result of litigation to which he was not a party, and that may have resulted in a verdict in D2's favour because it was incompetently conducted by P's counsel.

Any resolution of these difficulties requires the relevant policies to be ranked in order of priority: the relevant considerations are D1's interest (to use a neutral word) in obtaining contribution, D2's interest in effectively retaining the immunity from further claims arising out of P's loss, and P's interest in recovering no less compensation from D1 than that to which he would have been entitled if D1 had been the only wrongdoer. It is not surprising to find that these questions have produced controversy among commentators, inconsistencies in the case law, and divergent responses from those law reform bodies and legislatures that have addressed them. We have already considered the effect of a settlement upon contribution claims, and will not restate here the arguments that led the Commission to the recommendations made in chapter 5. Of the issues that are included in this chapter, the time limitation problem has proved the most important and difficult in practice, and is considered fully below. Whether a person can be sued for contribution after obtaining a favourable judgment in earlier litigation instituted by the injured person is the second topic discussed in this chapter. A third topic concerns the effect upon the right of contribution of a settlement, release, or waiver by P of D2's liability.

2. CONTRIBUTION AND LIMITATION PERIODS

(a) The Present Law

Ontario was one of the first jurisdictions to include in its statutory provision governing a right of contribution among tortfeasors a section that deals specifically with the effect upon contribution of the expiry of a period of limitation within which the injured party is required to institute proceedings against the person from whom contribution is claimed. Section 9 of the *Negligence Act*[7] provides as follows:

> 9. Where an action is commenced against a tort feasor or where a tort feasor settles with a person who has suffered damage as a result of a tort, within the

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[6] (1799), 8 T.R. 186, 101 E.R. 1337 (K.B.).

[7] *Supra*, note 4.

period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tort feasor provided,

(a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and

(b) there has been compliance with any statute requiring notice of claim against such tort feasor.

A considerable body of case law has grown up around section 9. Unfortunately, many of the cases are not easy to reconcile and they contain a significant degree of confusion. This is attributable in part to the inherent difficulty of the issues and the lack of clarity in the legislation, which, as we shall see, has been made more opaque by the courts' interpretation of other provisions. Moreover, many of the judgments are shortly and inadequately reasoned.

It should be recalled that the principal section of the *Negligence Act* is section 2, which creates a right of contribution where "damages" have been caused by the "fault or neglect of two or more persons", and states that where "two or more persons are found at fault or negligent, they are jointly and severally liable" to the person injured. It should be noted that section 2 does not define those from whom contribution may be claimed as tortfeasors who are *liable* to the injured person: the language of section 2 does not, therefore, plainly require that contribution may be recovered only from those who *at the time that the claim for contribution is made* could be successfully sued by the plaintiff.

Claims for contribution following a settlement between P and D1 are dealt with in section 3 of the *Negligence Act*, which defines those from whom contribution may be claimed as "any other tort feasor who is, or would if sued have been, *liable*" for the damage in respect of which the settlement was made. While section 3 limits the persons from whom contribution may be recovered to those who are or would if sued have been liable, it is ambiguous concerning whether D2 is liable to contribute if, at the time of the contribution claim, D2 could defend it successfully by showing that he had ceased to be liable to P by virtue of the expiry of a limitation period. The use of the past tense in the phrase, "would if sued have been liable", might simply allow contribution to be recovered when D2 had ceased to be liable to P because the settlement had satisfied P's claims against all other tortfeasors. Alternatively, it might mean that a person who *at some time* could have been held liable to P is required to contribute to D1, the settling tortfeasor, irrespective of the reason why D2 may no longer be capable of being sued successfully by P.

The ambiguities in sections 2 and 3 about the relevant time at which D2 must be liable to P seem to have contributed to the difficulties in interpreting section 9. Before turning to the case law in which these provisions, and particularly section 9, have been considered, it will be helpful to attempt to

identify the more obvious meanings that they could bear. In cases where the same limitation period applies to P's cause of action against both D1 and D2, the meaning of section 9 is clear. It is a condition precedent to a successful claim for contribution that, when P commences proceedings against D1, or P and D1 settle, D1's liability must not have become statute barred. If it has not, then D1 may claim contribution by serving a third party notice, or by instituting an action against D2 under section 3, subject to the normal limitation provision governing such a claim. However, if between the time that P commenced proceedings against D1, or they settled, and D1 claimed contribution from D2, D2's liability to P has become statute barred, D1 must claim contribution within a year. In addition, any statutory requirement that D2 be given notice of P's claim must have been satisfied. Problems arise when different limitation periods apply to P's causes of action against D1 and D2 or when the relevant limitation periods start running at different times. The problem considered in this chapter is the effect upon D1's *prima facie* right to contribution of the fact that D2's liability to P is statute barred when D1 claims contribution from D2.

A narrow construction of the operation of the *Negligence Act* may lead to the view that, apart from section 9, D2 is liable to contribute only if, at the time when D1 was successfully sued by or settled with P, P could have enforced his right to compensation against D2. This is consistent with the notion that the right of contribution depends upon the conferral of a benefit upon D2 by D1's payment: if, at that time, D2 has ceased to be liable to P, then D1's payment to P will not have discharged any legal liability that D2 then had to P. The effect of section 9 is simply to give D1 a year from the date of the judgment against him in P's favour, or from the date of D1's settlement with P, within which to claim contribution, provided that notice has been served upon D2 in time. The fact that D2 has, at the time of the contribution claim, ceased to be liable to P by virtue of the expiry of a limitation period governing the enforcement of P's rights against D2 does not defeat D1's claim. The requirement of section 9 that D1 must have been sued by, or settled with, the injured person "within the period of limitation prescribed for the commencement of actions by any relevant statute" should be taken to refer to the limitation period prescribed for P's action against D1 and P's action against D2.

Thus, suppose that P has been injured by the concurrent negligence of D1 and D2. D2 is a police officer and entitled on the facts to the benefit of the six months' limitation period contained in the *Public Authorities Protection Act*.[8] P commences proceedings against D1 six months less one day after the accident. On the view of the *Negligence Act* described above, D1 could commence proceedings for contribution within one year of the date of the judgment in P's favour against D1, even though, by that time, D2's liability to P had ceased to be enforceable by virtue of the special statutory limitation period. The purpose of section 9 is, on this view, to provide a specific limitation period within which the contribution claim must be made, in circumstances where the period within which P had to sue D2 has expired.

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[8] R.S.O. 1980, c. 406, s. 11.

Section 9 negatives the notion that time runs against D1's claim for contribution from the moment when P's right of action arose: it gives D1 a year to enforce his claim against D2, whose liability to P has expired after the judgment against D1. However, if P instituted proceedings against D1 six months and one day after the accident, D1 would have no right of contribution against D2.

The attractive aspects of this interpretation are that it is consistent with the restitutionary basis of contribution, and gives effect to what might have been a sensible compromise between D1's right to contribution and D2's retaining the protection of a statutory limitation period that expired after P obtained judgment against D1. One difficulty with it, however, is that it is settled law, at least at the level of the Ontario Court of Appeal, that there are very few circumstances in which D1 can commence proceedings for contribution *after* he has been held liable to P. By virtue of *Cohen v. S. McCord & Co. Ltd.*,[9] unless D1's claim is based upon a payment that he made to P under a settlement, contribution must normally be claimed by serving a third party notice. Thus, if it is necessary that D2 must still be liable to P at the time when judgment is given in P's favour against D1, there will be few occasions on which section 9 enables proceedings for contribution to be commenced at a time when D2 has ceased to be liable to P. For most purposes, section 9 will apply only when contribution is claimed following a settlement between D1 and P that was made when D2 was still liable to P. This may have been a factor in the courts' apparent rejection of the interpretation of section 9 discussed above.

The relevant provisions of the *Negligence Act* are capable of a wider interpretation, which would enable D1 to recover contribution from D2 even though, when P instituted proceedings against D1 or P and D1 settled P's claim, the limitation period governing D2's liability to P had already expired. The one restriction upon D1's right is that he must have commenced proceedings for contribution within a year of the judgment or the settlement. On this view, the Act overrides, for the purpose of contribution, the limitation period applicable to the enforcement of P's rights against D2, and departs from the restitutionary principles that in other respects regulate the right to contribution. This result may be reached solely on the basis of section 9, if it is assumed that a right of contribution does not otherwise arise under sections 2 and 3 if D2 has ceased to be liable at the time of the judgment against D1 or the settlement between P and D1. When section 9 refers to the commencement of the action against D1 by P, or the settlement between P and D1, "within the period of limitation prescribed for the commencement of actions by any relevant statute", the period of limitation in question is only that governing P's claim against D1. It has been argued that it is not necessary to find in section 9 any reference to the expiry, at the

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[9] *Cohen v. S. McCord & Co. Ltd.*, [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.). See, also, *Rickwood v. The Town of Aylmer*, [1957] O.W.N. 243, 8 D.L.R. (2d) 702 (C.A.), and *infra*, ch. 9, sec. 2(a)(v). It may well be argued, of course, that s. 9 should be regarded as authorizing claims for contribution to be made by way of a separate action, as well as by third party notice.

time of the judgment against D1 or the settlement between P and D1, of the limitation period governing P's rights against D2, because sections 2 and 3 only require that D2 must have been liable *at some time* to P.[10]

On this view, the effect of section 9 is to reduce to one year the time within which the contribution claim must be made in order to give some recognition to the statutory policy of limiting the time within which P must sue D2. However, to the extent that contribution claims must generally be made before judgment is rendered against D1,[11] the one year limitation period would seldom be relevant.

Turning now to the case law, it is worth repeating our earlier observation that it does not readily yield a particularly clearly reasoned analysis of the relevant statutory provisions.[12] Nonetheless, as discussed below, the weight of authority, and especially the more recent cases, seem to adopt the broader of the interpretations of the *Negligence Act* described above. Thus, a third party notice may be served upon a tortfeasor from whom the plaintiff can no longer recover damages because of the expiry of a limitation period and, it would seem, D1 can be awarded contribution in the event that the other elements of the right to contribution are satisfied. It should be noted that judges sometimes refer to the fact that the *Negligence Act* provides that a third party notice may be served upon a person who "is or *may be* wholly or partly *responsible* for the damages claimed".[13] A decision that a person may be joined as a third party, even though no longer liable to P, may therefore not be intended to decide conclusively that section 9 enables the court to award contribution.

In *Paul Papp Ltd. v. Fitzpatrick*,[14] D2 appealed against a Master's order giving D1 liberty to add D2 as a third party to proceedings instituted by P against D1. P had sustained injuries as a result of a collision in which vehicles driven by P and D1 were involved. D1 believed that the accident may have been caused in part by D2's negligence in failing properly to repair the brakes on D1's car. Schroeder J.A. pointed out that it was sufficient for the service of a third party notice under section 6 that the person whom it is sought to serve " 'is or may be wholly or partly responsible' for the damages claimed",[15] and that even though P's claim against D2 may have been barred by *The Highway Traffic Act*,[16] D1's right of contribution against D2

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[10] Cheifetz, *Apportionment of Fault in Tort* (1981), at 49-55. On s. 9 generally, see *infra*, ch. 9. This view was recently adopted in *Re Urquhart and Hatt* (1982), 132 D.L.R. (3d) 685 (Ont. Co. Ct.).

[11] *Cohen v. S. McCord & Co. Ltd.*, *supra*, note 9.

[12] *Supra*, this sec.

[13] *Negligence Act*, *supra*, note 4, s. 6.

[14] [1967] 1 O.R. 565 (C.A.).

[15] *Ibid.*, at 568.

[16] R.S.O. 1960, c. 172, s. 147(1). Section 147(1) imposed a 12 month limitation period upon the recovery of damages occasioned by a motor vehicle. This provision was re-enacted

may be preserved by section 9 of the *Negligence Act*.[17] Similar conclusions appear to have been reached in *Judson v. Vasilaras and Town of Lindsay*[18] and *Attorney-General of Ontario v. Kilbrick*.[19]

The question was discussed further in *Paquette v. Batchelor*,[20] in which D1 sought to serve a third party notice upon D2. When P commenced the main action against D1 the limitation period governing D2's liability to P had already expired. Osborne J. held that since the contribution claim was an independent action, the six months' limitation period did not start to run in D2's favour until D1 had been held liable to P. Moreover, he also stated that section 9 preserved D1's rights from being extinguished by the lapse of time that barred P's claim against D2. A similar analysis of section 9 was adopted in *Pek v. Levasseur*.[21] Courts in other provinces with legislation similar to section 9 have reached the same result as Ontario courts.

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in R.S.O. 1970, c. 202, s. 146(1), but amended by *The Highway Traffic Amendment Act, 1975 (No. 2)*, S.O. 1975, c. 37, s. 1, so as to extend the limitation period to 2 years.

[17] Although not mentioned in the reasons for judgment, the result of this case may be explicable on another ground. The time limitation in s. 147(1) of *The Highway Traffic Act* was subject to s.s. (3), which provided that if proceedings were instituted within the limitation period, counterclaims or third party proceedings were not barred by the fact that they were instituted outside the period. Section 147(3) now appears, in the same terms, as s. 180(3) of the *Highway Traffic Act*, R.S.O. 1980, c. 198.

Third party proceedings must still normally be instituted within the period prescribed by the applicable rules of civil procedure: *Linder v. Hyla*, [1962] O.W.N. 13 (H.C.J.). However, the court does have a discretion to allow the third party notice to stand despite the lapse of a limitation period and the fact that the notice is out of time: *Boylan v. Red Barn System (Canada) Ltd.* (1974), 7 O.R. (2d) 380 (Div. Ct.), and *Brock University v. Stewart Hinan Corp. Ltd.* (1980), 27 O.R. (2d) 329, 108 D.L.R. (3d) 137 (Div. Ct.). On the factors to be considered by the judge in exercising his discretion to issue a third party notice outside the normal limitation period, see *Pugliese v. National Capital Commission* (1981), 32 O.R. (2d) 264 (Div. Ct.); *Waterloo County Board of Education v. Mark, Musselman, McIntyre, Coombe* (1982), 38 O.R. (2d) 61 (H.C.J.); and *Ejsymont v. Toronto-Dominion Bank* (1984), 47 O.R. (2d) 596 (S.C.O.).

The current Rules of Civil Procedure, O. Reg. 560/84, make some significant changes to the law relating to third party proceedings. In particular, only the plaintiff in the main action may object to the issue of a third party claim on the ground that it is out of time. The court still retains a discretion to extend the period within which the claim must normally be issued. See, generally, Rules of Civil Procedure, R.29, especially rr. 29.02 and 29.09.

[18] [1971] 1 O.R. 290 (H.C.J.). In this case, the person sought to be added as a third party was a municipal corporation. It objected to service on the ground that *The Municipal Act*, R.S.O. 1960, c. 249, s. 443(2), imposed a 3 month limitation period in respect of the liability alleged. The application by D1 was allowed without prejudice to the right of D2 to rely at trial upon the statutory limitation period. Section 443(2) has been re-enacted in identical terms as s. 284(2) of the *Municipal Act*, R.S.O. 1980, c. 302.

[19] (1974), 4 O.R. (2d) 313 (C.A.). A recent decision, *Brock University v. Stewart Hinan Ltd.*, *supra*, note 17, affirms this view of the law. See, also, *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[20] (1980), 28 O.R. (2d) 590, 111 D.L.R. (3d) 642 (H.C.J.).

[21] (1982), 38 O.R. (2d) 108 (Master S.C.O.), aff'd (1982), 38 O.R. (2d) 109n (H.C.J.). See, also, *Ejsymont v. Toronto-Dominion Bank*, *supra*, note 14.

The courts have insisted, however, that the third party notice be served by the defendant within the period specified by the Rules of Civil Procedure,[22] although this may be extended with leave of the court.[23]

On the other hand, it is quite clear that courts will not allow the *Negligence Act* to be used so as to revive a liability of D2 to P that has ceased to be enforceable as a result of lapse of time. And for this purpose it does not seem to matter whether D2 is sought to be made a party-defendant by P[24] or by D1.[25]

(b) Alternatives for Reform

The uncertainties in the present law and the difficulties of construing section 9 justify, in themselves, a re-examination of this aspect of the *Negligence Act*. In addition, as indicated, any extension of the right to contribution among wrongdoers to include those in breach of contract or of a fiduciary obligation is likely to give rise to new aspects of the time limitation problem.[26] The *Limitations Act*[27] provides different limitation periods for different causes of action; limitation periods may start running from different points depending upon the nature of the cause of action; and actions based upon allegations of breach of a fiduciary obligation are also subject to the more flexible equitable doctrine of laches. While the best solution to many of the difficulties discussed in this part of the chapter could be resolved by reforming and simplifying the law relating to limitations,[28] short of this there are a number of possible reforms that could be made to the law of contribution with respect to the problem under consideration.

One alternative would be to permit D1 to claim contribution regardless of the fact that D2's liability to P had become statute-barred. As we have seen, Ontario courts have adopted this approach, as has at least one English court. In *Harvey v. R.G. O'Dell Ltd.*,[29] P instituted proceedings against D1 at

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[22] *Supra*, note 17.

[23] See discussion *ibid*.

[24] *Lattimor v. Heaps* (1931), 40 O.W.N. 580 (H.C. Div.).

[25] *Adams v. W.J. Hyatt Ltd.*, [1954] O.W.N. 895 (H.C.J.). See, also, *Kane v. Haman*, [1971] 1 O.R. 294 (H.C.J.), where it was also said that the fact that the time limitation on D2's liability to P had expired did not prejudice D1's right to join D2 as a third party.

[26] See *supra*, note 1.

[27] R.S.O. 1980, c. 240.

[28] See Ontario Law Reform Commission, *Report on Limitation of Actions* (1969); Ontario, Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (1977); and former proposed *Limitations Act, 1983*, Bill 160, 1983 (32d Legis. 3d Sess.).

[29] [1958] 2 Q.B. 78. See, also, *Hordern-Richmond Ltd. v. Duncan*, [1947] K.B. 545.

a time when P's claim against D2 was statute-barred. McNair J. held that D1 was entitled to serve a third party notice upon D2 despite the fact that D2's liability to P had lapsed. The English *Law Reform (Married Women and Tortfeasors) Act, 1935*[30] contained no provision analogous to section 9 of the Ontario Act; the critical words in section 6(1)(c) of the English statute defined a person liable to a contribution claim as "any other tort feasor who is, or would if sued have been, liable in respect of the same damage...". McNair J. held that if D2 had not been sued by P, it was enough for D1 to establish that D2 would have been liable if sued at some time.[31] He thought it contrary to Parliament's intention in repealing the rule in *Merryweather v. Nixan*[32] that P should be able to defeat D1's ability to claim contribution by delaying proceedings against D1 until such time as D2 was no longer liable to P.

The High Court of Australia has placed the same interpretation upon the New South Wales statute that is identical to the English Act of 1935. Thus, in *Brambles Construction Pty. Ltd. v. Helmers*,[33] Windeyer J. said: "It is enough that there was a time, before the liability of [D1]...was actually ascertained, at which...[P] could have" sued D2. In those Canadian provinces whose legislation on contribution among tortfeasors is derived from the English Act of 1935, there are a number of cases holding that it is enough that D2 was at one time liable to P, even though the limitation period governing P's claim against D2 had expired by the time that D1 was held liable to P.[34] There are also cases that do not follow *Harvey's* case, and deny D1 a right to contribution in these circumstances.[35]

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[30] *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30 (U.K.).

[31] In *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, [1955] A.C. 169, [1954] 3 All E.R. 661 (H.L.) (subsequent reference is to [1955] A.C.), the House of Lords had held that if D2 *had* been sued by P, and P's claim had failed because D2 could claim the protection of a short limitation period, then D1 had no right to contribution. It is anomalous that D1's success should depend solely upon whether P had instituted proceedings against D2. The reasoning in *Wimpey* was applied in *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, to legislation worded similarly to s. 6(1)(c) of the English Act of 1935. See, also, *Aleman v. Blair and Canadian Sugar Factories Ltd.* (1963), 44 W.W.R. (N.S.) 530 (Alta. S.C., T.D.).

[32] *Supra*, note 6.

[33] (1966), 114 C.L.R. 213 (H.C.), at 221.

[34] See, for example, *Clayton v. McNeill's Taxi Ltd., City of Edmonton and Crassland*, [1946] 3 W.W.R. 218 (Alta. S.C., T.D.); *British Columbia Hydro and Power Authority v. Kees van Westen*, [1974] 3 W.W.R. 20 (B.C.S.C.); *Scott v. Whitworth*, [1974] 6 W.W.R. 740 (Alta. S.C., App. Div.), leave to appeal to Supreme Court of Canada refused, [1974] S.C.R. vii; and *MacKenzie v. Vance* (1977), 74 D.L.R. (3d) 383 (N.S.S.C., App. Div.).

[35] *Cobble v. Mills*, [1947] 2 W.W.R. 790 (Alta. S.C., T.D.), and *Johnson v. Vancouver General Hospital and Van Louie* (1973), 44 D.L.R. (3d) 286, [1974] 1 W.W.R. 239 (B.C.C.A.).

The English *Civil Liability (Contribution) Act 1978*[36] appears to have given statutory authority to the result in *Harvey v. R.G. O'Dell Ltd.* Section 1(3) provides as follows:

> 1.—(3) A person shall be liable to make contribution...notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

Despite the somewhat ambiguous drafting of the last clause of this subsection, it would seem that D2 remains liable to contribute even though his liability to P had become statute-barred at some time before D1 claimed contribution.[37] This provision not only requires D2 to pay contribution, even though D1's payment to P conferred no benefit upon him, but also continues D2's liability to contribute for exactly the same length of time that governs *all* contribution claims.

This approach, in effect, ignores, for the purposes of D1's claim for contribution, the fact that D2 had ceased to be liable to P when D1's right to contribution arose. A number of advantages can be claimed for it. First, D1 is not prejudiced by the selection by P of the time at which he commences proceedings against D1. This, of course, is an event over which D1 has no control, and it is unfair to prejudice D1 by denying him a right to contribution solely because P delayed bringing suit until the time within which he had to sue D2 had expired. To regulate the right of contribution in this way introduces into the distribution of P's loss among those whose wrongful conduct caused it an arbitrariness that the abolition of the rule in *Merryweather v. Nixan* was intended to avoid.

Secondly, the right to contribution is a claim that is independent of P's rights against the wrongdoers. It follows from this that the fact that D2 is no longer liable to P should not inevitably preclude D1 from claiming contribution: D1's right arises at the time that he is held liable to P or settles with P. The limitation period governing the contribution claim should run in D2's favour, and against D1, from the time that the right to contribution arose, not from the time when P's rights accrued. This solution also avoids the absurdity of saying that, if D2 cannot be required to contribute where he had ceased to be liable to P when P sues D1, D1's right to contribution is statute-barred before it has even arisen.

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[36] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.).

[37] To construe s. 1(3) as applying to all periods of limitation would, of course, produce the opposite result from that described in the text. The last clause of s. 1(3) probably only applies to claims for the recovery of land and goods, where D2 has acquired, or P has lost, title as a result of the lapse of time. In other contexts, the expiry of a limitation period is normally said to bar a plaintiff's remedy, not extinguish his right.

The Law Commission's Working Paper (*Contribution*, Working Paper No. 59 (1975)), paras. 31-35, at 18-22, canvassed the possible solutions to the problem without

There are, however, some serious objections to this solution. First, it is inconsistent with the restitutionary character of contribution claims: if D1 is held liable to or settles with P at a time when P's rights against D2 are statute-barred, D1's payment to P discharges no legally enforceable liability of D2 and thus confers upon D2 no benefit, the retention of which would unjustly enrich him at D1's expense. The discharge of an unenforceable legal obligation does not generally constitute a benefit in the law of restitution.

Secondly, it may be argued that to require D2 to contribute to a liability discharged by D1 when P could no longer enforce D2's liability to him would deprive D2 of the protection that it was contemplated he should enjoy when P was statutorily required to enforce his rights against D2 within a shorter period than that applicable to P's rights against D1. If the result is unsatisfactory, it is because the law of limitations is defective. Anomalies produced by that branch of the law should be redressed by reforming it directly, and not indirectly by tinkering with the principles underlying the law of contribution. While it is true that for some purposes the right to contribution is independent of the rights of the injured party and arises from the time when D1 is held liable to or settles with P and not from the time when P's cause of action arose, nonetheless, if D2 remains potentially liable for contribution in respect of a payment made by D1 to P after D2 had ceased to be liable to P, D2 is, in substance, deprived of the protection afforded by the limitation period within which P must enforce his rights against D2. If D2 defends against the contribution claim by disputing his liability to P or the degree of fault that should be attributed to him, he will have to rely upon the same stale evidence upon which he would have had to rely if he had been sued out of time by P. Allowing D1 to claim contribution in these circumstances also prevents D2 from regarding any potential liability that he may have incurred as a result of P's injury as concluded at the expiry of the limitation period.

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making any provisional recommendation. In its Report, the Law Commission recommended no change in the law, but referred the problem to the Law Reform Committee for its consideration when reviewing the law relating to limitation periods: *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977) (hereinafter referred to as "Law Commission Report"), para. 32, at 10. The final Report of that Committee (*Twenty-First Report (Final Report on Limitations of Actions)* (Cmnd. 6923, 1977)), para. 3.34, at 40, recommended that there should be no change in the law as it had been established in *Harvey v. R.G. O'Dell Ltd.*, *supra*, note 29. It concluded that, despite the theoretical possibility that the present law exposed D2 to a claim for contribution long after his primary liability to P had expired, it "causes few problems in practice" because well advised plaintiffs sue all possible defendants at one time, and if they do not, the defendant who is sued will normally quickly bring them into the action by the service of a third party notice.

The Law Reform Commission of Hong Kong recommended the adoption of the solution contained in the English Act of 1978, but was critical of the draftsmanship of s. 1(3) (*Report on the Law Relating to Contribution Between Wrongdoers*, Topic 5 (1984), paras. 6.2-6.4, at 33 (hereinafter referred to as "Hong Kong Report")).

The South Australian *Wrongs Act, 1936-1975*, s. 25(1)(a)(iv) and (3), operates in much the same way: see *Monaghan v. Wardrope and Carroll Pty. Ltd.* (1970), S.A.S.R. 575 (S.C.), and *Aakster v. H.A. Chalmers Pty. Ltd.* (1972), 3 S.A.S.R. 519 (S.C.).

The third objection is that if D2's liability to P arose from a breach of contract, and the contract included a short limitation period, to permit D1 to claim contribution from D2 in respect of a liability established outside this period would deprive D2 of part of the bargain that he had made with P. Contracts should not lightly be upset in order to prevent a third party (D1) from suffering some "injustice". The Commission has already argued in the context of contractual exemption and limited liability clauses that D1 should not be given a windfall for which he had not bargained.[38]

A second approach to the issue under consideration would remove some of the force of the objections to the alternative considered above by providing for a short limitation period within which contribution must be claimed when D2's liability to P has become statute-barred at the date of either a settlement between P and D1 or the institution of proceedings by P against D1. This may have been the kind of scheme originally contemplated by section 9 of the *Negligence Act*. It might be suggested, therefore, that, where D2's liability to P had expired at the time of the settlement between P and D1 or the institution of proceedings by P against D1, D2 should remain liable to a contribution claim made within six months of either of these dates, even though the normal limitation period governing contribution claims would not otherwise expire until considerably later.[39]

This approach has been adopted by the Alberta Institute of Law Research and Reform, which has recommended that contribution should be given a limited priority over D2's security from suit outside the period governing his liability to P.[40] It has therefore proposed that contribution may be claimed from D2, even though he had ceased to be liable to P when P instituted proceedings against D1, provided that D1 serves a third party notice within six months from the date when P served notice of his claim upon D1. D2 would have six months from the time when he was served with notice by D1 to serve notice upon D3. The Institute also proposed that D1 should be able to continue his claim for contribution by way of an action if P

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[38] See *supra*, ch. 6, secs. 3(d)(i)a and b. See, also, *infra*, note 43, on the possible effect of the *Uniform Contributory Fault Act* on contractually imposed limitation periods. The Uniform Act was adopted by the Uniform Law Conference of Canada in 1984: see *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

[39] The *Limitations Act*, *supra*, note 27, contains no specific limitation period for contribution claims, but the period is probably 6 years, since quasi-contractual claims (or equitable claims analogous thereto) are, presumably, governed by the period applicable to actions in contract: see *Black v. Horseman* (1974), 4 O.R. (2d) 188 (H.C.J.). However, it is also arguable that the right of contribution under the *Negligence Act*, *supra*, note 4, falls within s. 45(1)(h) of the *Limitations Act* as an action given by statute for damages or a sum of money. Compare *Schwella v. The Queen*, [1957] Ex. C.R. 226, and *Sherritt v. Thorold Concrete Block Co.*, [1954] O.W.N. 535 (C.A.).

[40] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"), at 62-71.

and D1 settled after P had served notice upon D1, and D1 had served a third party notice upon D2.

The Institute was unable to make an analogous recommendation to cover the case where P has never instituted proceedings against D1, and where D1's claim for contribution is based upon a settlement between P and D1. In this situation, the Institute recommended that D2 should not be liable to a claim for contribution in respect of a payment by D1 to P under a settlement that was made after D2's liability to P had ceased to be enforceable by virtue of the lapse of time.

The Alberta Institute's proposal may be attacked on the ground that it extends D2's liability to contribute beyond the contractual or statutory limitation period within which P must sue D2. Moreover, where P must proceed against D2 within a particularly short limitation period, this provision might expose D2 to liability to D1 for a substantial time after his liability to P had expired, especially if P commenced proceedings against D1 just before D1's liability became statute-barred. In addition, its different treatment of claims based upon the liability of D1 established following the institution of legal proceedings by P, on the one hand, and settlements, on the other, is unsatisfactory.[41]

The *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada,[42] contains no provisions that bear specifically upon the problem under consideration.[43] However, it may be that the definition in section 1(a) of concurrent wrongdoers as persons "whose wrongful acts contribute to the same damage" only requires that they must have been potentially liable at any time after P sustained the loss.

A third, and quite different, solution would be to impose upon the injured person the cost of his failure to institute proceedings against D1 until the lapse of time had rendered P's rights against D2 unenforceable. As might be anticipated, this is the approach adopted in the Irish *Civil Liability Act, 1961*,[44] section 35(1)(i) of which provides that the plaintiff shall be respon-

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[41] This point is conceded in the Alberta Report, *ibid.*, at 71. There is no explanation why the Institute did not recommend that D1 could claim contribution within 6 months of making a settlement with P, even though D2's liability to P had expired by the time of the settlement. To make D1's right depend upon whether or not P had instituted legal proceedings against D1 before the settlement was made seems odd.

[42] *Supra*, note 38.

[43] It may be that the definition of a "release" in s. 1 of the Uniform Act as including an agreement that limits the liability of a person for damages applies to a limitation period contained in a contract. If so, then s. 12(2) solves the contribution problem by reducing the damages recoverable by the injured person by the amount that would otherwise have corresponded to the degree of responsibility for the loss that was attributable to the concurrent wrongdoer whose liability has ceased to be enforceable by virtue of the contractual clause.

[44] *Civil Liability Act, 1961*, No. 41.

sible for the acts of a concurrent wrongdoer against whom he can no longer proceed by virtue of the lapse of a statutory limitation period.

The proposal that the injured person's damages should be reduced if he *unreasonably* delayed proceedings against D1 until P's claim against D2 had become statute-barred has been supported by Professor Larson,[45] and some judicial support can be found in the judgment of the Alberta Supreme Court, Appellate Division, in *County of Parkland No. 31 v. Stetar*,[46] in which P was awarded judgment against D1 for that portion of P's loss that corresponded to D1's degree of fault. P was left to bear the share attributable to D2, whom he could no longer sue, and from whom D1 could not obtain contribution because P had failed to serve notice upon D2 in time. The Supreme Court of Canada, however, reversed this decision, and awarded damages against D1 for the whole of P's loss; D1 was denied a right of contribution against D2.

The advantages of the position adopted in the Irish Act are that it protects D2 from stale claims and gives full effect to the reasons for giving D2 the benefit of a short limitation period against P. In addition, it prevents D1 from being prejudiced by P's delay, a matter over which he has no control. It thus limits the ability of P arbitrarily to cast the entire burden of compensating him, without any opportunity of apportionment, upon one of the concurrent wrongdoers.

The disadvantages of the Irish solution are that it derogates from the principle that the injured person should not be prejudiced by the existence of another wrongdoer. Moreover, the plaintiff should not be penalized for deciding to proceed against only one wrongdoer, nor prejudiced in his claim against D2 for the way in which he decides to conduct his litigation with D1. Any limitation upon P's right to recover that is regulated by reference to an *unreasonable* failure to proceed in time against D2 is likely to be difficult to apply.

A final approach would be to change the present law so as to give the highest priority to the restitutionary basis upon which claims for contribution rest, leaving any injustices that result from the differing operation of the limitation periods in respect of P's claim against D1 and D2 to be dealt with by reforming the major source of the problems, namely, the law of limitations. Nor is this view inconsistent with the notion that the right of contribution is an independent right that arises at the time when D1's liability to P is ascertained and that any limitation period should run from then, and not from when P's cause of action arose. The argument is not that, if D1 is sued by P after D2 had ceased to be liable to P, D1's claim for contribution is statute-barred; rather, it is that the right to contribution never arose at all because D1's payment can confer no benefit upon D2.

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[45] *Supra*, note 5, at 501.

[46] See *supra*, note 31, at 889-90.

The principal weakness of this proposal is, of course, that it enables P to prevent D1 from claiming contribution by simply delaying proceeding against D1 until D2's liability to P has ceased to be enforceable. This difficulty may be met in part by allowing D1 to seek a declaration of contingent entitlement to contribution from D2 in the event that D1 is sued by P and held liable. A proceeding of this kind would put D2 on notice that he might be required to pay contribution, and would enable D1 to preserve his ability to claim contribution in the event that P sued D1 at a time when D2 was no longer liable to P. It can also be argued that it is unattractive to give D2 the benefit of a technical and often substantively unmeritorious defence at the expense of D1.

(c) Conclusions

The Commission has concluded that the consequences of the operation of different limitation periods should not fall on P. The Irish Act's solution should therefore be rejected. Proposals for reforming the law of contribution among wrongdoers seem an inappropriate means for requiring the injured person to sue all who may possibly be liable for his loss, on pain of suffering a reduction in damages, and for derogating from the important principle of the *in solidum* liability of those whose concurrent wrongs have caused a single, indivisible loss. Some of the most cogent doubts about the desirability of the right to contribution, which were considered in chapter 4 of this Report,[47] spring from a fear that retaining and extending the right may prejudice the injured person's ability to recover full compensation, and a belief that this risk is not worth running in order to achieve fairness among the wrongdoers.

A more difficult question is whether D2 should remain liable to pay contribution well beyond the period of his enforceable liability to P. The issue here is whether priority should be given to D2's protection from claims arising, in the broad sense, out of the loss inflicted upon P, or to D1's interest in ensuring that his ability to recover contribution is not prejudiced by the conduct of P after P's cause of action against D1 and D2 has arisen. As we have seen in this chapter, powerful arguments can be made on both sides of this issue, and no result may be completely satisfactory.

We turn first to consider the case of a statutory limitation period. The Commission has decided to recommend that a person should remain liable to pay contribution notwithstanding the fact that the injured person's rights against him have become unenforceable as a result of the expiry of a statutory limitation period or, indeed, the existence of an equitable defence based on delay.[48] Thus, D1's ability to claim contribution should not be

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[47] *Supra*, ch. 4, sec. 3(a)(i).

[48] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 15(a). The Act appears as an Appendix of this Report. Compare the Commission's *Report on Limitation of Actions*, *supra*, note 28, at 113.

prejudiced by any delay on the part of P in instituting proceedings against D2, even if D2's liability had become statute-barred when P instituted proceedings against D1. The Commission also recommends that the result should be no different if D1's claim is based upon a settlement that he has made with P.[49] It would be arbitrary to prevent D1 from recovering contribution after settling with P, if, at the time of the settlement, D2's liability to P had ceased to be legally enforceable as a result of a statutory limitation period. It would either discourage the well-advised from settling the injured person's claim, or deny contribution to a person who could have recovered if he had forced P to sue him.

The preceding recommendations respecting the effect of a statutory limitation period would, therefore, embody the interpretation given by our courts to the *Negligence Act* and make it applicable to all rights of contribution among concurrent wrongdoers, whether tortfeasors or those in breach of a contractual, statutory, or fiduciary duty.

It is now necessary for us to consider the limitations imposed by paragraphs (a) and (b) of section 9 of the *Negligence Act*. With respect to paragraph (b), it seems to us to be difficult in principle to continue to justify the existing distinction between a limitation period and a statutory provision that a person must be served with notice of the claim. Nor, indeed, do we see why P's failure to comply with any procedural requirement should be treated differently. In all these cases, the purpose is to protect a potential defendant from defending an action for damages by the injured person at a time when he may no longer expect to have to do so and, indeed, when he has, for example, lost or destroyed the evidence or when the evidence can no longer be obtained. If the right to contribution is not defeated by the plaintiff's delay in instituting proceedings, then it should be equally immune to a failure by the plaintiff to serve notice of his claim upon a concurrent wrongdoer or to comply with any other procedural requirement, and we so recommend.[50]

We do recognize, however, that some statutes require the giving of notice of a claim within a very short period of time from when P's cause of action arose. For example, section 284(5) of the *Municipal Act*[51] provides that no action shall be brought against a municipality for breach of its duty to keep highways and bridges in repair unless notice of the claim is given within ten days (or seven days in the case of an urban municipality). Short notice provisions of this kind are designed to give the defendant the opportunity to preserve the evidence needed to defend P's action where that evidence is likely to be lost or to disappear quickly.

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[49] Draft Act, s. 15(d).

[50] *Ibid.*, s. 15(c).

[51] R.S.O. 1980, c. 302. See, also, *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, s. 7(3).

Under our recommendation permitting D1 to claim contribution even though notice was not given to D2 within the time stipulated by statute, it would be possible, for example, for a concurrent wrongdoer to claim contribution against a municipality several years after an accident, and without any notice to the municipality, where the claim is based on the municipality's alleged failure to clear the highway of snow and ice, even though the injured party would be barred from bringing his own action in respect of the accident. On the other hand, as we have said, the alternative solution to the problem created by P's failure to serve notice is also subject to considerable criticism, both in principle and in practice. Moreover, not all notice provisions are as short as the one contained in section 284(5) of the *Municipal Act*; to the extent that particular notice periods and particular limitation periods are of the same length of time, the arguments for treating the two in different ways clearly become less compelling.

The Commission does, however, believe that attention should be drawn to the various statutory notice provisions, particularly having regard to the fact that our proposals would alter the law quite significantly in this area. Accordingly, we recommend that, should the Commission's proposed legislation be enacted, those governmental officials responsible for the administration of statutes requiring notice of a claim to be sent to an alleged wrongdoer should review the nature and purpose of the statutory notice requirements in order to determine whether they are of overriding importance and, therefore, whether they ought to be made to apply notwithstanding the Commission's *Contribution and Comparative Fault Act*. If it is thought that the failure to give notice under a particular statutory notice provision should continue to be available as a defence to a contribution claim, an express *non obstante* clause could then be enacted. We believe that this proposal properly places the burden on government officials administering the relevant statutes to justify the retention of existing notice provisions and, therefore, the protection of concurrent wrongdoers against whom contribution is claimed.

With respect to the special limitation period, set out in section 9(a), within which a claim for contribution must be made against a wrongdoer who has ceased to be liable to the injured person, the Commission wishes to make the following comments in support of its proposal in favour of abolition. For one thing, nearly all claims for contribution made following the institution of legal proceedings by P against D1 will be made in the course of that litigation by means of a third party claim. Moreover, in the cases in which D1 claims contribution in an independent action, following either a settlement with P or a judgment against him in P's favour, the requirement that D1 proceed within a year of judgment or settlement does not, in our view, provide a very effective compromise between the interests of D1 and D2. The length of time for which D2 will remain exposed to liability to D1 after P's action against D2 has been barred by lapse of time depends, under section 9, upon the date of the settlement or judgment, not the date when P's rights against D2 ceased to be enforceable. To this extent, paragraph (a) is an arbitrary restriction upon the rights to recover contribution.

We turn now to consider the effect of a contractually imposed limitation period. In this case—where the contract between P and D2 includes a short limitation period that, at the operative time in terms of D1's contribution claim, renders D2 immune from suit by P—we believe that different considerations from those described above ought to apply. It will be recalled that, in the context of contractual exemption clauses, we were not of the opinion that a contractual term should be set aside, and that D2 should be deprived of the bargain entered into with P, in order to ensure that D1 is not prejudiced by this bargain. To assist D1, we would have been compelled to give D1 a windfall for which he had not paid.

For these reasons—which, we believe, apply equally in the analogous case of a contractual limitation period in favour of D2—the Commission recommends that it should be a defence to a claim for contribution for the contributor to establish that proceedings were instituted by the injured person against the claimant, or a settlement was made between them, after the expiry of a limitation period contained in a contract made between the contributor and the injured person before the latter's cause of action arose against the contributor.[52]

3. THE EFFECT OF A JUDGMENT IN FAVOUR OF D2 IN PROCEEDINGS INSTITUTED BY P

(a) Introduction

In this part of the chapter, the question to be considered is whether it should be a defence to a claim for contribution that the person from whom it is claimed (D2) has ceased to be liable to the injured person (P) because, before the claimant's (D1) right to contribution arose (as a result of a settlement between P and D1 or successful legal proceedings by P against D1), D2 had already been sued by P and judgment had been given in D2's favour. This problem may arise in a number of different contexts. First, P may have sued D1 and D2 together, and P's claim against D2 may have been dismissed. To the extent that the law allows a claim for contribution that could have been made by a third party notice to be pursued in a separate action, should the failure of P to obtain judgment against D2 be a conclusive defence to the action for contribution? Secondly, P may proceed against D2 alone. If P's claim is unsuccessful, but he later sues D1, should D1 be entitled either to serve a third party notice or to institute a separate action for contribution against D2? Thirdly, if P has unsuccessfully sued D2, and P and D1 later settle P's claim, should D1 be able to recover contribution from D2? Fourthly, if P successfully sued D1, who does not serve a third party notice upon D2, and P then sues D2 because D1 has not satisfied the judgment in P's favour, but loses, can D1 subsequently claim contribution from D2 if he later satisfies P's judgment?

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[52] Draft Act, s. 14(1)(b).

The problem common to these hypotheticals is that when D1 was held liable to or settled with P, D2 could not legally be required to compensate P because the judgment rendered in D2's favour in the action instituted by P had made the issue of D2's liability to P *res judicata*. To use the principles of the law of restitution, D1's satisfaction of P's claim will confer no benefit upon D2 because D2 could not have been successfully sued by P: he had no legal liability to P that D1's payment could discharge. Another reason why it would be unjust to hold D2 liable to contribute is that it would expose D2 to the "double jeopardy" of having to relitigate with D1 a question that had already been decided in his favour in the action brought by P. There is, in addition, a public interest in the finality of litigation. On the other hand, it can be argued that D1 should not lose his right to contribution and thus be prejudiced by the outcome of litigation in which he did not participate: the doctrine of *res judicata* usually only applies when the issues and the parties are identical.

(b) The Present Law

It has already been noted in this Report that section 2 of the *Negligence Act*, which is the principal provision creating the right of contribution among concurrent tortfeasors, does not define those who may claim contribution, and those from whom it is claimed, as persons who are *liable* to the injured person for the loss that he has sustained. Similarly, section 6, which provides for the service of third party notices for contribution, speaks of the person upon whom notice may be served as one who "is or may be wholly or partly *responsible* for the damages claimed". The language of these sections thus leaves it open to argument that they do not limit those from whom contribution may be claimed to persons who, at the time when the right to contribution arose, were still potentially liable to be sued successfully by the injured person. However, it should also be noted that section 3 defines those from whom contribution may be recovered by a person who has settled with the injured person as "any other tort feasor who is, or would if sued have been, liable in respect of the damage".

There seems to be relatively little case law in Ontario on the application of these provisions to the problem under consideration. However, the issue did arise in *Horvath v. Registrar of M.V.*[53] In this case, the Registrar sought to join as third parties persons (D2) against whom the plaintiff's claim had already failed, apparently on its merits. The Master dismissed the application on the basis of what seemed to him to be "the clear effect" of section 6 of the *Negligence Act*. He held that, although the issue of D2's liability to P was not strictly *res judicata* against D1 for the purpose of claiming contribution, it was not intended "that the defendant [D2] in the original action should be subject to the possibility of being put in jeopardy again under [section 6 of the *Negligence Act*]".[54]

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[53] [1961] O.W.N. 324 (Master S.C.O.).

[54] *Ibid.*, at 325.

The reasons given for judgment, however, are not very convincing, and its authority may therefore be open to question. The learned Master relied upon *Sinkevitch and Beaudoin v. Canadian Pacific Railway Co.*[55] for the proposition that section 6 does not authorize the issue of a third party notice against a person "against whom a judgment for damages could not in law be given". But the person from whom contribution was claimed in *Sinkevitch* enjoyed a statutory immunity from suit under workers' compensation legislation. A case in which D2 was never potentially liable to the plaintiff does not necessarily determine the result of one in which D2's defence is that, although liable to P at one time, he has ceased to be liable by virtue of a judgment in his favour in an action brought by P.

The effect upon a contribution claim of an existing judgment in favour of D2 has been considered on a number of occasions in other jurisdictions, where the relevant legislation was worded, like section 3 of the Ontario *Negligence Act*, so as to define potential contributors as those who are or would if sued have been *liable* in respect of the plaintiff's damage.

The best known is the decision of the House of Lords in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*[56] In this case, P sued D1 and D2 for damage caused by the negligence of the defendants' employees. D1 was held liable, but P's action against D2 was dismissed on the ground that P had instituted proceedings after the expiry of the short limitation period within which public authorities were at that time required by statute to be sued.[57] By a majority, the House of Lords struck out D1's third party notice for contribution on the ground that section 6(1)(c) of the *Law Reform (Married Women and Tortfeasors) Act, 1935*[58] contemplated only two categories of persons from whom contribution could be sought. These were tortfeasors who had been held liable to P in legal proceedings and those against whom no legal proceedings had been instituted by P, but who would, if sued, have been held liable. Thus, there was no right to claim contribution from a person in the position of D2 in this case, that is, a person who had been sued and held *not* liable, even though the plaintiff's action had failed because it was out of time, rather than on the substantive issue of the legal wrongfulness of D2's conduct.[59] It seems tolerably clear that their

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[55] [1954] O.W.N. 21 (H.C.J.), at 23.

[56] *Supra*, note 31.

[57] *Limitation Act 1939*, c. 21 (U.K.), s. 21. This Act was repealed by the *Law Reform (Limitation of Actions, &c.) Act, 1954*, c. 36 (U.K.). However, in Ontario, short limitation periods apply to some actions against public authorities (*Public Authorities Protection Act*, *supra*, note 8, s. 11(1)), and municipalities (*Municipal Act*, *supra*, note 18, s. 284(2)). The *Health Disciplines Act*, R.S.O. 1980, c. 196, s. 17, also contains a short limitation period for malpractice suits.

[58] *Supra*, note 30.

[59] This was the view of Viscount Simonds and Lord Tucker. The third member of the majority, Lord Reid, held that a contribution claim failed if D2 had ceased to be liable either when D1 was sued by P or when D1 claimed contribution from D2. He did not find it necessary to select between these because on the facts D2 had ceased to be liable to P at both times.

Lordships would have reached the same result if D2 had been found not liable to P on the merits and D1 had subsequently contended that the court had erred in finding D2 not liable to P.[60]

A question not decided in *Wimpey* was whether the result would have been the same if D2 had not been sued by P. This would have required their Lordships to consider the issue discussed in the previous part of this chapter, namely, the effect upon a claim for contribution of the expiry of the limitation period in D2's favour against P by the time that P sued D1 or D1 claimed contribution from D2. The subsequent decision in *Harvey v. R.G. O'Dell Ltd.*[61] that, where D2 had not been sued, he could be required to pay contribution to D1 provided only that he had *at some time* been liable to P, created a serious anomaly in English law. It was difficult to justify a conclusion that whether D2 was bound to contribute after P's claim against him had become statute-barred depended upon the fortuity of whether P had sued D2 or not.

The reasoning and the result in *Wimpey* have been followed by the Supreme Court of Canada in a case that arose under Alberta's *Tort-Feasors Act*,[62] which defined those from whom contribution could be claimed in the same way as the English Act of 1935. In *County of Parkland No. 31 v. Stetar*,[63] P sued D1 and D2 for injuries caused by the defendants' negligence. The trial judge attributed 75 percent of the fault to D1, and 25 percent to D2. However, P did not obtain judgment against D2, a municipality, because notice had not been given to D2 of P's claim in the short period provided by the *Municipal Government Act, 1968*.[64] D1's claim for contribution was dismissed.[65]

While these decisions seem clearly to preclude a claim for contribution under section 3 of the Ontario *Negligence Act* against a person who has already been held not liable, for whatever reason, to the injured person, neither they nor *Horvath's* case can be regarded as settling conclusively the

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[60] Thus, Viscount Simonds stated that it would be undesirable to expose D2 to a second action, brought by D1, on the assumption that P's action had failed because "the case had been inadequately presented or even because the judge or jury had taken a wrong view of it" (*George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, note 31, at 178).

[61] *Supra*, note 29.

[62] R.S.A. 1955, c. 336 (now R.S.A. 1980, c. T-6).

[63] *Supra*, note 31.

[64] C. 68 (now R.S.A. 1980, c. M-26).

[65] Dickson J. stated that had Alberta's *Contributory Negligence Act*, R.S.A. 1970, c. 65 (now R.S.A. 1980, c. C-23), applied, then the county might have been liable to pay contribution, even though the plaintiff's action failed because timely notice of the claim was not given. See, also, *Mackenzie v. Vance*, *supra*, note 34, and *Campbell v. Bartlett and Yonge (third party) (No. 2)* (1979), 107 D.L.R. (3d) 591, [1980] 1 W.W.R. 758 (Sask. C.A.). But see *J.R. Paine and Associates Ltd. v. Strong, Lamb and Nelson Ltd.* (1979), 103 D.L.R. (3d) 579, [1979] 6 W.W.R. 353 (Alta. C.A.).

question whether sections 2 and 6 permit the service of a third party notice upon an alleged tortfeasor against whom P has unsuccessfully instituted proceedings in respect of the damage.

The rationale for the courts' interpretation of the relevant legislation in *Wimpey* and *Stetar* was later made clear by the English Court of Appeal in *Hart v. Hall & Pickles Ltd.*[66] In this case, the Court allowed a third party notice to be served upon a person who had previously been sued by P, but whose action had been struck out for lack of prosecution. Lord Denning M.R. distinguished the case before him from *Wimpey* in this way:[67]

> When an action has been dismissed for want of prosecution, the defendant has not been 'sued to judgment' at all. There has been no finding on the merits. There has been no judgment that the defendant is not liable. It is only an interlocutory order—a matter of procedure—which does not affect substantive rights. It is not a final decision. It does not give rise to an estoppel by res judicata. The plaintiff can start another action for the same cause, so long as he does so within the period allowed by the Statute of Limitations.

The concluding sentences of this passage reveal a rationale that may well extend beyond the particular language in which the liability to contribute is defined in the 1935 English Act and those statutes that are patterned after it.[68] If the reason for the failure of P's action against D2 is such that he is free to institute fresh proceedings against D2, then D2 remains potentially liable to P when contribution is claimed by D1. If Di is held liable to P, then his payment is still capable of conferring a benefit upon D2 by discharging an existing liability to P. In other words, the passage supports a restitutionary view of the right to contribution.[69]

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[66] [1969] 1 Q.B. 405 (C.A.).

[67] *Ibid.*, at 411.

[68] See *Re Urquhart and Hatt*, *supra*, note 10.

[69] A similar result was reached in a New Zealand case, *Calderwood v. The Nominal Defendant*, [1970] N.Z.L.R. 296 (C.A.), in a rather different context. P had been injured by the negligence of D1 and D2. P first sued D2, who served a third party notice upon D1. Judgment was given in P's favour, the judge having found that P had sustained a loss of about N.Z.$24,000. However, D2's liability was limited by statute to $15,000. The comparative degrees of fault of D2 and D1 were assessed at 60% and 40%, respectively, and D1 was ordered to pay contribution to D2 of 40% of $15,000. P then instituted a second action, this time against D1, in order to recover the difference between $24,000 and the $15,000 recovered in the first action against D2. D1's liability to pay P this sum was not disputed, but the question was whether D1 could recover 60% of it from D2 by way of contribution. D1 argued that the judge in the first action had erred because he ought to have apportioned between D1 and D2 the full $24,000, provided only that D2 could never have been required to pay more than $15,000. The Court of Appeal refused to consider whether the judge had erred in the way contended by D1. It denied D1's claim for contribution on the ground that D2 had ceased to be liable to P as a result of satisfying the judgment entered against D2 in the first action. When D1 paid under the judgment in the second action, he did not thereby discharge any existing liability to P owed by D2.

(c) Alternatives for Reform

One possible solution to the problem raised above is to adopt the view taken by the English courts and the Supreme Court of Canada towards the interpretation of legislation that differs in some significant respects from the present Ontario *Negligence Act*. New legislation could provide that if P had instituted legal proceedings against D2 that had resulted in a judgment in D2's favour that rendered the issue of D2's liability to P *res judicata* between them, then D2 could not subsequently be held liable to contribute to D1. Since the principal reasons for this view are the restitutionary nature of the right to contribution and the public interest in discouraging multiple suits and in not reopening questions already litigated, thereby exposing litigants to "double jeopardy", it should generally make no difference whether P's action failed because of delay or some other "technical" reason, or on more substantive questions of D2's liability to P.

The English Law Commission proposed that a person who, after a trial, has been found not liable to the injured person "on the merits" should not subsequently be liable to pay contribution to a concurrent wrongdoer.[70] The requirement that the judgment in D2's favour should be "on the merits" was intended to exclude collusive judgments[71] and the dismissal of a proceeding for want of prosecution or on the ground that it had been brought outside the limitation period within which P must enforce his rights against D2. The Law Commission took the view that if P's action against D2 had failed because P had not succeeded in establishing that D2 was ever liable, D2 ought not to be placed in a position of double jeopardy by being forced to relitigate the substantive issues.[72]

This matter is dealt with in the English *Civil Liability (Contribution) Act 1978*,[73] section 1(5) of which provides that a judgment in an action brought by P against D2 "should be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of [D2]". This is presumably intended to implement the English Law Commission's recommendation, although whether it is appropriately worded so as to have this effect has been doubted.[74] The Law Commission of Hong Kong

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[70] Law Commission Report, *supra*, note 37, paras. 62-65, at 19.

[71] For an exampie, see *Corvi v. Ellis*, [1969] S.C. 312 (Ct. of Sess.). What the Commission had in mind was the institution of proceedings against D2 for the sole purpose of precluding a subsequent claim for contribution by D1: it will be recalled that a settlement between P and D2 leaves D2 exposed to the possibility of a claim for contribution by D1 in the event that D2 settled for less than his proportionate share of the liability.

[72] See, generally, Law Commission Report, *supra*, note 37, paras. 60-67, at 18-20.

[73] *Supra*, note 36.

[74] If this provision is read literally and in isolation, it might be argued that D1 could not reopen a finding that P's action failed because D2's liability had become statute-barred. However, s. 1(5) should be read in conjunction with s. 1(3), which provides that it is no

has adopted the English Law Commission's recommendation in this respect.[75]

The Alberta Institute for Law Research and Reform has also recommended the adoption of the English Law Commission's resolution of these issues.[76] Thus, the Institute concluded that "it is preferable for D1 to lose his claim for contribution than that D2 should be required to defend himself twice". A judgment in favour of D2 would not, however, bar a claim for contribution in cases where P's action had failed because it was commenced after any relevant limitation period had run in D2's favour, or where the plaintiff's action had been dismissed for want of prosecution, or where judgment was obtained as a result of collusion between P and D2. Section 13 of the Canadian *Uniform Contributory Fault Act*[77] is similar to section 1(5) of the English Act of 1978, but, unlike the English legislation, the *Uniform Contributory Fault Act* makes no specific provision for the effect upon contribution claims of the running of time in D2's favour against P. It also limits the scope of the estoppel to "any issue that has been determined *on its merit* in the action".

The advantages of this view are that it effectively protects D2 from "double jeopardy" and avoids the waste of resources involved in allowing the relitigation of issues. To the extent that it denies a right of contribution against a person who can no longer be sued by the injured person when P institutes proceedings against or settles with D1, it is consistent with the restitutionary nature of the claim. On the other hand, of course, it deprives D1 of a right that he would otherwise have had if P had not sued D2, and imposes upon D1 the cost of the failure of P's action against D2, to which D1 was not a party and over which he had no control. The exceptions to the rule contained in the English Act of 1978, the Alberta Institute's Report, and section 13 of the *Uniform Contributory Fault Act* attempt to minimize this disadvantage by confining it to judgments made "on the merits".

A second approach, at the opposite end of the spectrum, would be a rule that the existence of a judgment in favour of the person from whom contribution is claimed should never be relevant to the liability of that person to pay contribution. The inquiry on the contribution claim would be confined to determining whether D2 ought to have been held liable to P. For this purpose, it should be open to D1 to produce evidence or legal argument to persuade the court of D2's liability (whether or not this material had been put before the court that determined P's action against D2), even though

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defence to a contribution claim that D2 has ceased to be liable to P. D1 could thus argue that D2 cannot rely upon the expiry of the limitation period as a defence to D1's claim. The drafting is not, however, satisfactory and departs from that proposed by the Law Commission.

[75] See paras. 6.5-6.9, at 33-35, of the Hong Kong Report, *supra*, note 37. It was, however, critical of the drafting of the 1978 Act on this point.

[76] Alberta Report, *supra*, note 40, at 76, Recommendation 18.

[77] *Supra*, note 38.

such a conclusion would be inconsistent with the judgment in the litigation instituted against D2 by P.

However, a special consideration arises if P's action failed against D2 because it was commenced after the expiry of the limitation period governing the enforcement of P's rights against D2. The Commission has already recommended that D2 should be required to contribute, even though, at the time when P settled with D1 or commenced proceedings against D1, D2 could no longer be sued by P.[78] It follows, therefore, that D1's claim for contribution will not be defeated by D2's establishing that P's action against him was properly dismissed as being out of time.

The advantage of this view is that it prevents D1 from being prejudiced by the conduct of P after he sustained the loss for which D1 and D2 were initially liable. It protects D1 from any adverse consequences of litigation to which he was not a party and puts him in the same position as he would have been if P had not sued D2. Of course, D2 may succeed in satisfying the court in the contribution proceeding that he had been correctly found not liable to P.

A third approach is reflected in the Irish *Civil Liability Act, 1961*,[79] which contains an elaborate set of provisions that are designed to avoid the most obvious injustices likely to be caused to D1 by the first approach, and to D2 by the second. First, section 29(5) of the Act provides that, where D1 and D2 are joined as parties-defendant to P's action, and P's action against D2 is dismissed, D1 is bound by any findings of fact and law upon which the judgment in D2's favour was based. However, D1 is not estopped from subsequently asserting that D2 was a wrongdoer if P obtained judgment in fraud of D1 or if the proceedings took place in a foreign jurisdiction in which D1 was denied an opportunity either to present evidence and legal argument designed to establish D2's liability to P, or to launch or to oppose an appeal against the judgment in the litigation between P and D2. In addition, under section 29(2), if D1 is joined as a third party to the suit between P and D2, D1 is bound by any finding of fact and law in the action on which he was given leave to defend. Where D1 was not a party to P's proceeding against D2, section 29(8) of the Act provides that it is no defence to a contribution claim that D2 had been unsuccessfully sued by P.

This last provision, however, must be read in the light of section 35(1)(j), which reduces the damages recoverable by P from D1 if D1 can establish that, despite an earlier judgment in favour of D2 in an action brought against him by P, both D1 and D2 were concurrent wrongdoers. P is thus identified with D2 and the damages that he can recover from D1 are reduced by an amount proportionate to the degree of fault that should have been attributed to D2. This solution removes from both D1 and D2 the harsh

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[78] See *supra*, this ch., sec. 2(c).

[79] *Supra*, note 44.

consequences of P's previous unsuccessful suit against D2, by penalizing the injured person. Moreover, it discourages a multiplicity of proceedings by giving P a strong incentive to proceed against D1 and D2 in a single action. The objection to this scheme is, of course, that it makes P worse off than he would have been if D1's wrongful conduct had been the sole cause of P's injury.

(d) Conclusions

The Commission does not favour the solution to this problem contained in the Irish Act. The avoidance of unfairness to D1 and D2 is purchased at the expense of the injured party. In our view, the adjustment of the secondary rights and duties of the wrongdoers should not be effected by frustrating a cardinal policy of the law respecting the primary right of the injured person to be compensated fully for the injury caused by the defendants' wrongful conduct. It is true that the plaintiff may avoid this unfortunate consequence by proceeding against D1 and D2 in a single action, but the penalty prescribed for P's failing to do this is unduly onerous. The Commission has already proposed sanctions that it believes may appropriately be imposed in order to encourage P to join all concurrent wrongdoers.[80] Moreover, to increase further the pressure upon P to sue all possible defendants together may add unreasonable elements of complexity, delay, hazard, and cost to P's ability to obtain relief. P's right to compensation should be neither substantively reduced nor procedurally burdened by the presence of more than one wrongdoer.

The choice thus lies between, on the one hand, exposing D2 to "double jeopardy" by reopening matters already litigated to judgment between P and D2, and, on the other, depriving D1 of the right to contribution that he would have enjoyed if P had not sued D2 and lost. Whichever view is adopted may cause hardship and violate a particular policy of the law.

In chapter 5, the Commission took the position that if D1 claims contribution after settling with P, D2 should not be able to defend the claim on the ground that D1 ought not to have settled because D1 was not liable to P.[81] In addition, in chapter 6 we recommended that, if D1 is successfully sued by P, it should not be a defence to any claim for contribution pursued in an independent action for D2 to prove that D1 ought not to have been held liable to P, except where the judgment against D1 was obtained by collusion or fraud.[82]

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[80] See *supra*, ch. 2, sec. 4(a).

[81] See *supra*, ch. 5, sec. 3(b).

[82] See *supra*, ch. 6, sec. 2. However, in the contribution action, D2 would be entitled to show that the court wrongly assessed the quantum of the injured person's loss in *P v. D1*.

If D2 cannot reopen a settlement between D1 and P or the liability of D1, as determined in *P v. D1*, then we believe that D1 should be bound by the result of the litigation between P and D2. Since D1's payment has conferred no benefit upon D2 that it would be unjust for him to retain, the costs involved in permitting further litigation of the same issues outweigh the benefit of attempting to achieve some rather nebulous notion of a fair apportionment of P's loss between D1 and D2. Moreover, to require D2 to defend a second trial may be regarded in the circumstances as especially harsh, particularly when judgment was given in D2's favour on a ground inconsistent with D2's ever having been liable to P.

Accordingly, the Commission recommends that it should be a defence to a claim for contribution for the contributor to establish that judgment on the merits has already been given in his favour in an action by the injured person.[83] This proposal should not apply, therefore, to the dismissal of the injured person's action for delay.[84] We also recommend that such a judgment should not be a defence to a contribution claim where it was obtained by collusion or fraud.[85]

Moreover, we wish to re-emphasize our support of the provisions in the Irish Act that make it clear that D1 is bound by any finding made in an action by P against both D1 and D2, as co-defendants. If D1 is brought into the action as a third party, he would also be bound by a finding made in the main action on which he has been given leave to contest.[86] Since P will often join all concurrent wrongdoers as defendants, and since, where he does not, D1 can normally be expected to serve a third party notice, the problem discussed in this part of the chapter may, in any event, arise only rarely.

4. THE EFFECT UPON THE RIGHT TO CONTRIBUTION OF A SETTLEMENT, RELEASE, OR WAIVER BY P OF D2'S LIABILITY

This Report has already considered the contribution implications of a settlement between one wrongdoer and the injured person. It was concluded that a settlement that still left another wrongdoer liable to be sued by the plaintiff should not protect the settling wrongdoer from a subsequent claim for contribution in the event that he had been able to settle with P for a sum less than an amount of P's loss that was proportionate to his due share.

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[83] Draft Act, s. 14(1)(c).

[84] *Ibid.*, s. 15(b).

[85] *Ibid.*, s. 14(2).

[86] See *supra*, ch. 6, sec. 2. This may already be the law in Ontario: *Kirk v. Faugh*, [1951] O.W.N. 745 (H.C.J.). See, now, Rules of Civil Procedure, *supra*, note 17, r. 29.05(5), which also provides that a third party who does not deliver a statement of defence to the main action is also bound by an order or determination made in the main action between the plaintiff and the party claiming contribution.

The Commission recommends that, even though the concurrent wrongdoer (D2) who settled with P, or to whom P gave a release or waiver, may have ceased to be liable to P by the time that D1 claims contribution, D1 should nonetheless be entitled to contribution for a sum proportionate to D2's proper share.[87] The settlement, release, or waiver will merely have the effect of reducing D1's liability to P. The Commission has taken the view that to apply a strictly restitutionary approach in this context would give P too much power to decide who should ultimately bear the loss.

RECOMMENDATIONS

1. (1) It should never be a defence to a claim for contribution for the contributor to establish that his liability to the injured person had ceased to be enforceable by reason of the failure of the injured person to comply with a procedural requirement, the expiry of a statutory limitation period, dismissal of the injured person's action for delay, or an analogous equitable bar upon a successful suit by the injured person. The contributor should not be protected from liability to contribute, even if he had ceased to be capable of being successfully sued by the injured person when that person commenced proceedings against or settled with the person claiming contribution.

   (2) Should the recommendation in paragraph (1) be enacted, those governmental officials responsible for the administration of statutes requiring notice of a claim to be sent to an alleged wrongdoer should review the nature and purpose of the statutory notice requirements in order to determine whether they are of overriding importance and, therefore, whether they ought to be made to apply notwithstanding the Commission's *Contribution and Comparative Fault Act*.

2. It should be a defence to a claim for contribution for the contributor to establish that proceedings were instituted by the injured person against the claimant, or a settlement was made between them, after the expiry of a limitation period contained in a contract made between the contributor and the injured person before the latter's cause of action arose against the contributor.

3. (1) It should be a defence to a claim for contribution for the contributor to establish that judgment on the merits has already been given in his favour in an action by the injured person, except where the judgment was obtained by collusion or fraud.

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[87] Draft Act, s. 15(d). For a recent decision affirming that this is already the law, see *Re Urquhart and Hatt*, *supra*, note 10.

(2) The recommendation in paragraph (1) should not apply where the injured person's action was dismissed for delay.

4. It should never be a defence to a claim for contribution for the contributor to establish that he had ceased to be liable to the injured person by virtue of a settlement made with, or a release or waiver of liability given by, the injured person after that person's cause of action against him arose.

CHAPTER 8

THE ASSESSMENT OF CONTRIBUTION

1. INTRODUCTION

The previous chapters of this Report have considered the circumstances in which a right of contribution should arise among concurrent wrongdoers who have caused a single loss to an injured person. In addition, they have canvassed the principal defences that should be available to a person against whom a right of contribution is asserted. In this chapter, we assume that a right of contribution has been established, and examine the principles that should govern the *amount* that the contributor ought to pay.

The task of quantifying D2's liability to D1 can be broken into a series of more specific questions. The first is to decide to what sum D1 and D2 are required to contribute; this we shall refer to as the "contributable sum". A second relevant consideration is the persons among whom the contributable sum should be divided. A problem that can arise in this context is that not all those liable to the plaintiff may be parties to the litigation in which the claim for contribution is made. In calculating how the loss ought to be divided among those who are parties, should account be taken of the existence of other wrongdoers who are not before the court? After determining the contributable sum and the number of parts into which it is to be divided, the last question concerns the quantification of each of those parts. In other words, on what basis should the court decide how much each of those liable to contribute is required to pay?

2. THE CONTRIBUTABLE SUM

(a) General

The situation considered throughout this Report is one in which the wrongful conduct of two or more persons has caused a single or indivisible loss to another. It is only in respect of damages for this loss that a right of contribution can arise. If it is possible to identify some element of the damage suffered by the injured person for which one wrongdoer (D1) is solely liable, then that person will have no reason for requiring others to bear that portion of the liability.[1] Since no one else is legally liable to compensate

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[1] See *Katzman v. Yaeck* (1982), 37 O.R. (2d) 500, at 504-07, 136 D.L.R. (3d) 536 (C.A.), where the injuries originally sustained in a motor vehicle collision, negligently caused by

the injured person for that item of her loss, any payment made by D1 to P in discharge of this liability confers no benefit upon anyone else. However, a defendant may claim contribution in respect of that part of the plaintiff's loss for which another is concurrently liable with the defendant.

An item of P's loss may be attributable solely to one wrongdoer because it is clear on the facts that her conduct alone caused it. But differences that result from the operation of rules of law of general application may also produce differences in the damages recoverable from the various wrongdoers. For instance, exemplary damages may be awarded against one defendant, but not the other.[2] Differences in the rules relating to remoteness of damage in tort actions and actions based on breach of contract may also result in a lower liability for one defendant. A fiduciary who profits from her breach of duty may be required to disgorge, even though the beneficiary of the relationship could not have made the profit for herself, and could not be said otherwise to have suffered a loss equal to the fiduciary's gain.[3] Only in respect of the injured person's loss may the fiduciary and another be concurrently liable.

In each of the circumstances described above, the sum to which the parties may be required to contribute is limited to that for which they are both liable. Not only does their common liability provide the amount beyond which they cannot be required to contribute, but the proportion of the liability attributable to their degree of fault is calculated as a percentage of this amount. On the other hand, if the liability of one concurrent wrongdoer is limited by the operation of a partial defence applicable to that person, then, according to the recommendations made in chapter 6, the contributable sum is calculated by reference to the parties' full liability to the plaintiff, and the limitation serves only to determine the maximum sum that the party with the limited liability can be required to contribute. Contractually or statutorily limited liability and the partial defence of

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the defendant, were increased by the negligence of the dentist, the third party, who subsequently treated her.

[2] On the award of punitive damages generally, see Waddams, *The Law of Damages* (1983), ch. 11. Punitive damages, or damages for mental distress, have not generally been regarded as recoverable for a breach of contract (*Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488 (H.L.)), but courts in Canada appear to be retreating from this position more quickly than English courts. For two recent statements of the growing willingness of Ontario courts to recognize this head of recovery, see *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652, at 663-64, 7 D.L.R. (4th) 342 (H.C.J.) (wrongful dismissal), and *Thompson v. Zurich Insurance Co.* (1984), 45 O.R. (2d) 744, at 750-53, 7 D.L.R. (4th) 664 (H.C.J.). See, also, Waddams, *supra*, this note, at 576-78.

See, however, *Vorvis v. Insurance Corp. of British Columbia* (1984), 53 B.C.L.R. 63, 9 D.L.R. (4th) 40 (C.A.), where a majority adhered to the view taken in the older authorities. See, too, *Attorney-General for Ontario v. Tiberius Productions Inc.* (1984), 46 O.R. (2d) 152, 8 D.L.R. (4th) 479 (H.C.J.).

[3] *Reading v. Attorney-General*, [1951] A.C. 507 (H.L.) and *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.) are the leading authorities.

contributory negligence that may be available to one defendant, but not the other, provide the most obvious examples.[4]

The reason for treating the latter cases differently from those considered in the previous paragraph is that, in the examples given in that paragraph, the defendants were not concurrent wrongdoers in respect of the larger sum for which only one was liable. On the other hand, the conduct of a person whose liability is limited by one of the special defences considered in the immediately preceding paragraph is still a legal cause of the injured person's loss. Her liability is limited, not because she is not a wrongdoer in respect of the whole loss, but because the plaintiff's conduct has reduced the damages recoverable. The defendants may be legally liable for causing the same loss, but the *damages* payable by way of compensation are different.

We turn now to consider some problems of calculating the sum to which concurrent wrongdoers must contribute when their wrongful conduct has caused a single loss for which they are liable to the injured party in the context of both settlements and successive judgments.

(b) Settlements

(i) General

As we have already seen, an individual who has settled with the injured person may recover contribution from others who are liable for the loss.[5] The Commission has recommended that this right should be retained, whether or not the settlement effectively bars the injured person from suing others in respect of the loss to which the settlement related.[6] The question considered here is the sum to which the person from whom contribution is claimed (D2) following a settlement between P and D1 should be required to contribute.

One view would be that it is for the court in the contribution claim to decide the amount for which D1 and D2 could have been held legally liable to pay to P by way of damages, and that this is the sum upon which the parties' proper share should be calculated. The justification for this view is that the purpose of contribution is to apportion between D1 and D2 their

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[4] The consequences for the right of contribution of the availability of one of these defences to a concurrent wrongdoer are described *supra*, ch. 6, sec. 3(d). In a recent case, it was said that a party whose liability to the injured person has been reduced as a result of a partial defence of contributory negligence likely cannot be required to contribute more than the amount to which her liability has thereby been reduced: *Acrecrest Ltd. v. W.S. Hattrell & Partners*, [1983] Q.B. 260, at 280-81, [1983] 1 All E.R. 17 (C.A.), overruled on other grounds by *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1985] 1 A.C. 210, [1984] 3 W.L.R. 953 (H.L.).

[5] *Supra*, ch. 5, sec. 2.

[6] *Supra*, ch. 5, secs. 3(a) and (c).

common liability to P, and that in order to ensure that neither is unjustly enriched at the expense of the other, the benefit obtained by D2 as a result of D1's discharge or reduction of D2's liability to P should be used as the amount in respect of which contribution may be required. An opposing argument would be that to require D1 to quantify with precision the liability of D1 and D2 to P would be unduly onerous, and would tend to discourage settlements. For if D1 settled with P on the basis of a sum that exceeded the total liability, then D1 would be forced to absorb the excess. It may be too generous to D2 to allow her to stand aside from the settlement, and then to contest a claim for contribution on the ground that D1 had settled for too high a figure.

An example will illustrate the choices. Suppose, for instance, that P's claim was for $10,000, but that she accepted from D1 the sum of $8,000 as a final settlement of her claim against D1 and any other person against whom she could have proceeded in respect of the injury. D1 then claims contribution from D2, who admits that D1 and D2 are equally at fault, but argues that P would not have recovered more than $7,000 if she had instituted legal proceedings against the wrongdoers. Should D1 be required to prove the exact amount that P would have been awarded if she had sued, or should D1 be able to rely upon the amount of the settlement as the proper figure? On the first view, D1 would recover $3,500 and would have to absorb the amount by which she overestimated her liability to P. On the other view, D1 would recover $4,000 and thus force D2, although no more at fault than D1, to pay a sum greater than half of her liability as would have been determined by the court. These extreme positions do not, of course, exhaust the possibilities: a compromise between the competing considerations outlined above might produce a rule that required D1 to prove that the amount for which she settled was a *reasonable* estimate of the common liability. A solution that is more favourable to D1's interest would regard the settlement figure as a presumptively correct assessment of P's recoverable loss, and place upon D2 the burden of proving that it was excessive.

The fact situation considered above may be varied by postulating a case in which P sued D2 after she had made a settlement with D1 that did not prevent P from suing other wrongdoers liable for P's loss. This could occur if D1 purported to settle only her own share of the liability, or if the agreement was not expressly made in final settlement of all the actions that P might have against others, and the settlement figure was less than P's recoverable loss or D1's payment was not forthcoming. In the litigation between P and D2, the court will determine P's recoverable loss; D2's liability will be calculated by deducting from this figure the amount that D1 paid P under the settlement. If D1 later claims contribution from D2, should D2's contribution be assessed with reference to the settlement figure or the figure at which the court in P's action against D2 fixed P's recoverable loss? What if D2 claims contribution from D1 by making her a third party to the main action? Should D1 be bound by the court's assessment of P's loss, even if it is less than the settlement figure?

(ii) The Present Law

The relevant provision in the *Negligence Act*[7] is section 3. This section provides that a tortfeasor who has settled with the plaintiff may recover contribution from any other tortfeasor "who is, or would if sued have been, liable in respect of *the damage*...". The party claiming contribution under this section is required to "satisfy the court that the amount of the settlement was *reasonable*, and in the event that the court finds the amount of the settlement was *excessive* it may fix the amount at which the claim should have been settled".

The Act, therefore, does not limit D1 to claiming contribution on the basis of the exact amount of P's legally recoverable loss; it does, however, place the onus of proving the reasonableness of the settlement figure upon D1, who will normally be able to discharge this burden by leading evidence from which the court can approximate what P would have recovered if she had instituted legal proceedings. In determining the reasonableness of a settlement figure it is relevant to take into account any amount by which P's damages would have been reduced as a result of her contributory negligence.[8] Once D1 has established the reasonableness of the settlement figure, the burden of proving that it was excessive shifts to D2. If the court finds that the settlement figure was excessive, D2 will only be required to contribute to the sum fixed by the court as that at which D1 ought to have settled P's claim. However, the Commission has previously proposed that a claimant who settled when she was not liable at all should not necessarily have the amount of the contributable sum reduced to zero. Such a result would negative the right of such persons to claim contribution, and would undermine the policy of encouraging settlements upon which the Commission has based its recommendation that D1 should be able to claim contribution even though she could not have been sued successfully by the injured person.[9] Indeed, a person who settled when she was not liable to the injured person should normally be entitled to an indemnity from those whose liability was thereby discharged.

The Act does not deal specifically with the application of section 3 to a situation where P's recoverable loss has already been quantified in legal proceedings instituted by P against D2, to which D1 was not a party. One possibility is that a court would simply apply section 3 in such a case exactly as it would have done if the common liability had not been determined in a prior legal proceeding at a figure lower than that on which the settlement between P and D2 was based. The language of section 3 would certainly support this conclusion, and it could also be argued that D1's right to contribution should not be reduced by the institution of legal proceedings by

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[7] *Negligence Act*, R.S.O. 1980, c. 315.

[8] *Nesbitt v. Beattie*, [1955] O.R. 111, [1955] 2 D.L.R. 91 (C.A.).

[9] *Supra*, ch. 5, sec. 3(b).

P against D2 to which she was not a party. Of course, if D2 brought D1 into the action by a third party claim, D1 would be entitled to contest the quantum of P's damages and would be bound by the judicial determination of the question. On the other hand, it may be argued that to calculate D2's contribution by reference to a figure that is higher than that for which she has been held legally liable is unfair, and is inconsistent with the restitutionary basis of contribution.

(iii) Other Jurisdictions

The principal bases upon which the contributable sum could be determined in a claim made following a settlement have already been outlined. This section provides a brief survey of the ways in which this problem has been dealt with in other jurisdictions.

a. Final Settlement

The Irish *Civil Liability Act, 1961*[10] contains a provision, section 22(1), that is substantially similar to section 3 of Ontario's *Negligence Act*. The Alberta Institute of Law Research and Reform has recommended the adoption of the Ontario formula.[11] Section 12(3) of the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada,[12] is worded slightly differently: it states that the sum to which D2 is required to contribute following a settlement between P and D1, which releases all the claims that P may otherwise have had, should be based on the lesser of the value of the consideration actually given for the release and the value that "in all the circumstances...it would have been reasonable to give for the release". However, it is unlikely that this wording would in practice produce any significantly different results from those that would follow from the formula suggested by the Alberta Institute and already contained in the Ontario Act. The American Uniform Comparative Fault Act[13] restricts the right to recover contribution to claims made following a total settlement, and then only "to the extent that the amount paid in settlement was reasonable".

A Working Paper published in 1983 by the Contracts and Commercial Law Reform Committee of New Zealand has recommended that D1 should be able to recover contribution based upon the amount of her settlement

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[10] *Civil Liability Act, 1961*, No. 41.

[11] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"), at 55-56.

[12] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

[13] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part), §4(b).

with P, provided that the settlement was reasonable "having regard to all factors that influenced the settlement", and that "D2 is liable to P for an amount equal to or exceeding the amount claimed by D1 by way of contribution".[14] This second requirement may limit the occasions on which D1 is able to use the settlement figure as the basis on which the loss should be apportioned, and may often require D1 to establish the precise amount of the parties' concurrent liability.

The English *Civil Liability (Contribution) Act 1978*[15] differs from the measures considered in the previous paragraphs, in that it does not expressly provide that a claimant for contribution who has settled with the injured person must prove that the settlement figure was reasonable. Thus, section 1(4) provides that contribution may be claimed by a "person who has made or agreed to make any payment *in bona fide settlement or compromise* of any claim made against him" by the injured person.

It is doubtful whether the omission of any express requirement that the settlement figure must be reasonable is likely to produce results that are materially different from those found in cases under the formula contained in the Ontario *Negligence Act*. Indeed, in making the recommendation that became section 1(4) of the 1978 Act, the English Law Commission thought that its proposal took "roughly the same line" as the Irish Act, and noted that section 22(1) of that Act "does not seem to have given rise to any difficulties or been the subject of criticism in the Republic of Ireland".[16] There is judicial authority for the proposition that a claim for damages for breach of contract may be quantified by reference to the amount for which the plaintiff settled a claim made by a third party only if the settlement figure was reasonable.[17] A settlement for an amount substantially in excess of the damages that the injured person would have recovered had she sued might well not be regarded by a court as *bona fide*. If this inference were drawn, then the result would seem to be that D1 could not claim contribution at all, a result that might be considered unduly harsh.

Some have thought, however, that the choice between the English and the Ontario solutions may have practical consequences. The Law Reform Commission of Hong Kong, for example, decided not to recommend the adoption of an explicit requirement that D1 establish the reasonableness of the settlement figure, on the ground that "a claimant would be required to

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[14] New Zealand, Contracts and Commercial Law Reform Committee, *Working Paper on Contribution in Civil Cases* (1983) (hereinafter referred to as "New Zealand Working Paper"), at 17.

[15] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.).

[16] The Law Commission, *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977) (hereinafter referred to as "Law Commission Report"), paras. 56-57, at 17.

[17] *Biggin & Co. Ltd. v. Permanite Ltd.*, [1951] 2 K.B. 314, [1951] 2 All E.R. 191 (C.A.).

prove the measure of damages strictly, which would involve a very complicated and expensive enquiry".[18] It noted that D2 was adequately protected from being required to pay an excessive amount as a result of either a collusive agreement between P and D1, or a gross overestimate of the amount of D1's liability, by the requirement that the claimant must establish the *bona fide* nature of the settlement. For similar reasons, the English House of Commons defeated an amendment proposed to the 1978 Bill that sought to insert an express requirement that the settlement figure must be reasonable.

b. Partial Settlement

Law reform measures in other jurisdictions appear not to have addressed the question of how to determine the sum to which the parties may be required to contribute following a settlement by one concurrent wrongoder that still leaves others exposed to an action by the injured person. Some jurisdictions have avoided the problem by denying a right to contribution in such circumstances.[19] But, for reasons advanced in chapter 5, the Commission has decided that a claim for contribution should be available on the basis of a partial settlement.[20]

(iv) Conclusions

a. Final Settlement

The Commission has decided to recommend that a formula similar to that already contained in section 3 of the current *Negligence Act* should be retained in any new statute that extends the right to contribution among concurrent wrongdoers, irrespective of the legal nature of the civil obligation owed to the injured person.[21] This formula appears to have worked satisfactorily in the past, and it is difficult to see why the extension of the right of contribution to include concurrent contract breakers and fiduciaries should make any difference. If the notion of a *bona fide* settlement implies that the settlement figure must be reasonable, then it is surely better that the requirement should be made express. In addition, this would keep the Ontario position in line with the Canadian *Uniform Contributory Fault Act*.[22] The Commission believes that to require the claimant for contribu-

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[18] The Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers*, Topic 5 (1984), para. 5.11, at 26. The issue is discussed more generally in paras. 5.9-5.13, at 25-27.

[19] See, especially, Alberta Report, *supra*, note 11, at 61, Recommendation 13, and the Canadian *Uniform Contributory Fault Act*, *supra*, note 12, s. 12(2).

[20] *Supra*, ch. 5, sec. 3(c).

[21] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 11. The Draft Act appears as an Appendix of this Report.

[22] *Supra*, note 12.

tion to establish to the court's satisfaction the reasonableness of the settlement figure neither unduly complicates the litigation of the contribution claim, nor effectively deters the making of compromises or settlements between the injured person and one of the potential defendants. Accordingly, we recommend that where contribution is sought on the basis of a full settlement made between the injured person and the claimant, the contribution payable by the contributor should be calculated by reference to the value of the consideration given for the settlement, which the claimant must establish it was in all the circumstances reasonable for her to give.[23]

If the claimant does not establish that the consideration actually given was reasonable, the contribution payable by the contributor should be based on the court's determination of the value of the consideration that it would have been reasonable for the claimant to have given.[24]

Where the claimant for contribution has settled the injured person's claim by performing services or delivering goods, then the court in contribution proceedings should be required to value these in order to determine whether the claimant has settled for a reasonable amount.[25]

b. Partial Settlement

Suppose that D1 has settled with P in a way that does not preclude the possibility that P may later sue D2 for the balance of the loss in respect of which the settlement was made. However, before legal proceedings are instituted against D2 by P, D1 claims contribution from D2. A question to be considered in chapter 9 is whether a person should be able to recover contribution before she has discharged more than the share of the common liability that should fairly be borne by her. Subject to this, however, we recommend that the amount of contribution payable in this hypothetical should be calculated by reference to the same principles as those proposed above for final settlements. In other words, the court should decide whether the settlement figure was reasonable and, if it was, D2 should be required to contribute to it.[26] If P subsequently sues D2 successfully or settles with D2, and D2 pays a sum that is more than her fair share of the common liability, D2 should be able to recover from D1 by way of contribution the amount by which this sum exceeds D2's fair share.[27]

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[23] Draft Act, s. 11(1).

[24] *Ibid.*, s. 11(2).

[25] *Ibid.*, s. 9(7).

[26] *Ibid.*, s. 10(1) and (2). Often, of course, if P has merely settled with D1 for her estimated share of the loss, the settlement figure will be significantly less than P's recoverable loss. In this case, the settlement figure will be the sum to which D2 will be asked to contribute.

[27] For a provision to this effect, see the Irish *Civil Liability Act, 1961*, *supra*, note 10, s. 22(2).

If the settlement between P and D1 included a promise by P to indemnify D1 against further claims in respect of the loss, D1 would normally be able to pass on to P

Where P institutes legal proceedings against D2 before D1 claims contribution, and D2 joins D1 as a third party in order to claim contribution, the contributable sum should be the amount of their common liability as determined by the court in that action.[28] The following hypotheticals will illustrate the operation of this proposal. Suppose that D1 settles with P for $10,000 in a way that allows P to proceed against D2. P does indeed sue D2 for that portion of her claim for damages that was not satisfied by the settlement, and then D2 makes a third party claim against D1. The court finds D2 liable, and calculates P's total loss at $30,000. Judgment is entered against D2 for this amount, less the $10,000 already paid by D1 under the settlement. The court further finds that D1 and D2 are equally responsible for P's loss. It follows from the recommendations made in chapter 5 that D2 is entitled to a contribution of $5,000 from D1, so that each ultimately will have paid $15,000 towards P's loss. At the end of the day, D1 has not been able to reduce her liability by making an advantageous settlement with the injured person, unless, of course, she has received an indemnity from P. There will be no inquiry in such a case as to whether the settlement figure represented a reasonable estimate of D1's proper share of P's recoverable loss. A reason for denying to D1 the latitude that the Commission has recommended should be extended to a person who makes a final settlement of all the injured person's claims is that full settlements deserve more encouragement than those that do not dispose, once and for all, of the need for further litigation by the injured person.

Let us suppose that the facts of our hypothetical are changed somewhat, so that the effect of the judgment is that P's total recoverable loss is calculated to be only $15,000, for which D1 and D2 are again found equally responsible. D1 has settled with P for $10,000. Having been joined as a third party by D2, D1 has crossclaimed for contribution from D2 in the event that she is held to have settled for more than her proper share. Judgment will be entered in P's favour against D2 for $5,000. If the contributable sum is the amount of the common liability to D1 and D2 as determined by the court, then D1 will be entitled to a contribution claim of $2,500. To regard the settlement figure as the contributable sum where D1 has overestimated her liability to P would be unfair, especially since she is not permitted to benefit from a settlement that is for less than her due proportion of P's loss, as determined by a court.

The situation may be complicated if the claim for contribution is made in an independent action, and not by way of a third party proceeding to the main action. In such a case, we recommend that the contributable sum should be the amount of the common liability as determined by the court in the independent action.[29] Thus, suppose that D1 settled P's claim for $500 in a way that did not bar P's action against a concurrent wrongdoer, D2. When

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the cost of the contribution. The amount of the sum that D1 was liable to contribute would then be of importance to P.

[28] Draft Act, s. 10(4).

[29] *Ibid.*, s. 10(3).

P sues D2, P's loss is found to be $1,500, and judgment is entered against D2 for this sum, less the $500 already paid to P under the settlement with D1. D2 did not issue a third party claim, but proceeds in a separate action against D1.[30] In this proceeding, D1 ought to be able to establish that their true liability to P was only $1,000, and if D1 and D2 are equally at fault, D2 will recover no contribution. This result may seem unjust to D2 who has had to pay more than D1, even though they have been found equally at fault; however, to allow D2 to base her claim for contribution on the amount that she was held liable to pay P would mean that D1 would be prejudiced by the outcome of litigation to which she was not a party.

On the other hand, D2 ought not to be able to claim that the true amount of their concurrent liability was for a sum greater than that determined by the court when P sued D2. Thus, in the above example, if judgment was awarded in P's favour against D2 for $1,500, D2 should not be able to argue in subsequent contribution proceedings that their "true" liability was $2,000 ($1,500 plus the $500 paid to P by D1), of which she has paid $1,000, and that she is therefore entitled to $500 as contribution from D1. D2 has, after all, had an opportunity to litigate her liability, and the matter has been judicially determined. Her recovery should be limited to $250, so that each will bear an equal share of the sum in which D2 has been held liable to P. The way in which the contributable sum should be apportioned will not have been judicially determined before D2 sues D1, and therefore it will be assessed in that litigation by the court, without regard to any assumption about her due share of the liability upon which D1 settled with P.

Finally, we recommend that, if the terms of the settlement provide for the performance of services or the delivery of goods, these should be required to be valued by the court in order to determine the amount of contribution recoverable.[31]

(c) Successive Judgments

It may be difficult to determine the sum to which concurrent wrongdoers are required to contribute when the injured person institutes separate actions against them. The courts that decide the two cases may calculate differently the damages recoverable by P. Suppose, for example, that P sues D1, who does not issue a third party claim against D2, and judgment is entered against D1 for $10,000. If D1 does not satisfy this judgment, or P believes that the damages awarded did not fully compensate her for her loss, a separate action may be instituted against D2.[32] Suppose that in the action

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[30] For the circumstances in which this may be possible, see *supra*, ch. 9, sec. 2(a)(v); for the Commission's recommendations that they should be extended, see *supra*, ch. 9, sec. 2(c).

[31] Draft Act, s. 9(7).

[32] It will be recalled that, under the present law, concurrent wrongdoers who are only severally liable can be sued separately, and that the plaintiff's damages may be assessed

by P against D2, to which D1 is not joined as a third party, P's loss is calculated to be only $5,000. If D1 satisfies P's judgment and D2 does not, is the sum to which D2 may be required to contribute $5,000 or $10,000?

Fortunately, there have been few occasions for problems of this kind—the product of a multiplicity of litigation from a single loss—to arise in Ontario.[33] This is largely because Ontario courts have generally required claims for contribution, following a judgment against the contribution claimant, to be made in third party proceedings. The great merit of this procedural requirement, first imposed in *Cohen v. S. McCord & Co. Ltd.*,[34] is that it ensures that one court will decide conclusively, in a single proceeding, such questions as whether D2, as well as D1, is liable to P and, if so, the amount of P's recoverable loss, and the basis upon which it is to be apportioned. The result will be binding upon the plaintiff, the parties-defend[illegible]d those joined as third, fourth, or subsequent parties. However, i[illegible]ar whether the Ontario courts' interpretation of the present *Negligence Act* will be upheld in this respect in the Supreme Court of Canada, or whether it will be applied by Ontario courts to a situation where a jurisdictional limit on the court in which the plaintiff commenced her proceedings prevents the defendant from joining a concurrent wrongdoer as a third party. The exclusive jurisdiction of the Federal Court of Canada over the liability of the federal Crown, and the apparent constitutional incompetence of that Court to entertain proceedings in which a claim is based on provincial law,[35] have already raised the possibility that multiple litigation can arise from a single accident, transaction, or loss, with the attendant danger that the courts dealing with discrete parts of the claims may reach inconsistent results.[36]

The possibility of multiple lawsuits may also be increased if the Commission's recommendation is accepted that the rule forbidding the institu-

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in the second action at a higher figure than they were in the first. The Commission has recommended that this common law rule should be applied to cases of joint liability as well: *supra*, ch. 2, sec. 4(b).

[33] An analogous problem under the present law can arise when both P and D1 have suffered a loss in a single accident—a multiple vehicle collision, for example. Suppose that D1 first sues D2 for the damage caused to D1's car by D2; the court finds that D2 was liable, but reduces D1's damages because she was contributorily negligent as to 25%. P then sues D1, who joins D2 as a third party. If the court finds that D1 and D2 were both liable for P's injury, are they bound by the finding in D1's action against D2 as to their respective degrees of fault?

An affirmative answer was given in *Kirk v. Faugh*, [1951] O.W.N. 745 (H.C.J.). There are decisions from other Commonwealth jurisdictions going both ways. See, for example, *Bell v. Holmes*, [1956] 1 W.L.R. 1359, [1956] 3 All E.R. 449 (Q.B.); *Marginson v. Blackburn Borough Council*, [1939] 2 K.B. 426, [1939] 1 All E.R. 273 (C.A.) (prior findings binding); *Randolph v. Tuck*, [1962] 1 Q.B. 175, [1961] 1 All E.R. 814; and *Jackson v. Goldsmith* (1950), 81 C.L.R. 446 (H.C.) (prior finding not binding).

[34] [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.).

[35] But see discussion *supra*, ch. 2, note 97.

[36] *Supra*, ch. 2, sec. 4(a).

tion of independent actions for claiming contribution should be relaxed.[37] The abolition of the judgment bar rule may also have the same effect.[38] However, it would be a mistake to overestimate the practical consequences of these proposed changes: a plaintiff will normally wish to join as many defendants to her action as she can, and it will generally be in the interests of those who are joined to have questions of contribution decided conclusively at the same time as their liability to the plaintiff is determined. Defendants are, therefore, still likely to claim contribution from their co-defendants and to issue third party claims against those whom the plaintiff has not proceeded. Thus, despite the theoretical difficulty of the issues considered in this part of the chapter, it is unlikely that the courts will have to deal with them with any frequency.

It will be recalled that, in chapter 6, we recommended that, if D1 is successfully sued by P, it should not be a defence to any claim for contribution pursued in an independent action for D2 to prove that D1 ought not to have been held liable to P,[39] except where the judgment against D1 was obtained by collusion or fraud, although D2 would be entitled to show that the court wrongly assessed the quantum of the injured person's loss in *P v. D1*. While a principle enshrining the sanctity of litigation, as envisaged above, can help to some degree to resolve claims to contribution advanced subsequent to P's separate successful actions against D1 and D2, such a principle cannot always deal adequately with successive judgments. Having regard to our proposal in chapter 6, it is clear as a general principle that, where a claim for contribution is made, neither D1 nor D2 would be entitled to open up the question of their liability to P. Put simply, each has already had her day in court on this issue, and no problem arises if, in the contribution action, the court were to accept their liability as having been conclusively established in the earlier litigation.

Such is not the case, however, where the courts that decided *P v. D1* and *P v. D2* assessed P's damages differently. Obviously, here the finality of litigation is impossible to achieve.

Accordingly, the Commission recommends that, where the injured person has obtained judgment against concurrent wrongdoers in separate proceedings and the damages of the injured person have been assessed differently, in a claim for contribution by one wrongdoer against another

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[37] This procedural question is considered fully in chapter 9 of this Report.

[38] *Supra*, ch. 2, secs. 2(a) and 4(a).

[39] See *supra*, ch. 6, sec. 2, and Draft Act, s. 8(1). In chapter 7, we considered the reverse situation—that is, where D1 seeks to open up P's prior unsuccessful litigation against D2—and recommended that it should be a defence to a claim for contribution for the contributor to establish that judgment on the merits has already been given in her favour in an action by the injured person, except where the judgment was obtained by collusion or fraud.

wrongdoer the court should be required to determine the sum to which the parties to the contribution claim shall contribute, without reference to the findings on damages in the earlier litigation.[40]

3. THE DIVISION OF THE CONTRIBUTABLE SUM: WHO MUST CONTRIBUTE?

Having determined the sum to which concurrent wrongdoers may be required to contribute, the next question concerns the division of this amount. The issue considered here is the number of portions into which the sum must be divided. The next section considers the principles for determining the size of each of these portions.

It has been recommended in this Report that the principle of *in solidum* liability should be retained as an important protection for those injured by others' wrongful conduct.[41] The person who has sustained the loss may recover the full amount of her damages from any one of a number of wrongdoers liable for the loss and, if she sues only one, she is not restricted to recovering from that person the part of her loss proportionate to the fault of the individual whom she has sued.

A right of contribution may therefore arise among those sued to judgment by P and anyone against whom a third party claim has been made. In addition, a person may claim contribution in an independent action following either a settlement or, in unusual circumstances, a judgment against her in an action to which she did not join the contributor as a third party. The entire loss will be divided among those sued, and the share attributable to a person who has not been made a party to any legal proceedings will be ignored. However, where one person is liable for another's wrong, the joint tortfeasors should count for this purpose as one. Thus, if P is injured by the tort of D1 in circumstances that make D2 vicariously liable, and by the tort of D3, then, if D3 is equally responsible with D1 for the loss, D1 and D2 will be liable between them for 50 percent and D3 for 50 percent.

Difficulties may also arise, although reported cases are very few, when P omits to sue one wrongdoer and that wrongdoer is not made a third party by the defendant, perhaps because neither P nor those whom she sued knew her identity or whereabouts. Thus, suppose that D1, D2, and D3 are equally

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[40] Draft Act, s. 8(2). See *Transit System, Inc. v. Slingland*, 266 F. 2d 465 (D.C. Cir. C.A. 1959), where P, in separate actions, obtained judgment against D1 for $15,000 and against D2 for $10,000. D1 and D2 were held equally at fault, and P executed the judgment for the larger amount. D2 was held to be liable to contribute that part of the judgment against her that the larger judgment bore to the sum of the two judgments. The following formula was used:

$$\frac{\$15,000}{\$25,000} \times \$10,000 = \$6,000$$

[41] *Supra*, ch. 3.

responsible for P's loss. P sues D1 who joins D2 as a third party. D1 and D2 are adjudged to be equally at fault, and D1 satisfies P's judgment in full. Is it open to D2 to argue that she is only liable to contribute up to one third of the damages because D3 is equally at fault? Or should the presence of D3 be ignored for this purpose, so that D1 is able to recover one half of the damages by way of contribution from D2? Or should D1 be able to recover from D2 two thirds of the damages, on the ground that she (D1) was only one third at fault? Lastly, it has been suggested that if D3's degree of fault is ignored, then it ceases to be practicable to determine the respective degrees of fault of the parties to the action, with the result that D1 and D2 must be deemed equally at fault by virtue of section 5 of the *Negligence Act*,[42] whether or not D1 was more or less culpable than D2.[43]

The Commission is of the view and, accordingly, recommends that in determining contribution among concurrent wrongdoers, the degree of fault attributable to an absent concurrent wrongdoer should be ignored, and 100 percent of the fault should be allocated among the parties before the court.[44] To attempt to apportion the fault that should be borne by D3 may well be both unjust and inconvenient. If D3 is never sued, because her identity or whereabouts cannot be established, it would be unjust to D1 to restrict her claim from D2 to one third of the common liability to P, and unjust to D2 to allow D1 to recover two thirds from her. To divide the contributable sum between D1 and D2 on the basis that they are 100 percent at fault recognizes their comparative culpability, and, of course, provides an incentive for them to add D3 as a fourth party. Should D3 later appear, and it is procedurally possible for contribution to be claimed other than after a settlement or by way of a third party notice, then D1 and D2 would be entitled to contribution from her.[45]

A variation on the theme of the "missing wrongdoer" may be found in the following situation. Suppose that P, D1, and D2 are all equally responsible for P's loss, but that P sues only D1. Should a court apportion the fault between P and D1 and reduce P's damages by half, with the possibility that P may sue D2 later and that D1 might be able to recover contribution from D2? Or should P's damages be reduced by only one third, which represents her proper share of responsibility if account is taken of the existence of D2? Or, lastly, should P obtain judgment against D1 for only one third of her damages, on the ground that D1 was only one third to blame?

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[42] Section 5 reads as follows:

> 5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

[43] Cheifetz, "The Missing Tortfeasor: A Problem in Fault Apportionment under the Ontario Negligence Act" (1977-78), 1 Advocates' Q. 270. The author discusses the question further in his book, *Apportionment of Fault in Tort* (1981) (hereinafter referred to as "Cheifetz"), at 22-23 and 106-10.

[44] Draft Act, s. 12.

[45] This is the solution contained in the Irish *Civil Liability Act, 1961, supra*, note 10, s. 25.

The current law in Ontario is not altogether clear. There are certainly *dicta* that support the view that 100 percent of the fault should be apportioned between P and D1 on the basis of their proper share *inter se*.[46] On the other hand, in *Colonial Coach Lines Ltd. v. Bennett*,[47] Laskin J.A., by way of *dicta*, said:

> [A] defendant found to be at fault and disappointed in his expectation of having a co-defendant share, as between themselves, a portion of the liability to an injured plaintiff may well be disentitled to shift additional blame to a plaintiff who has been already fixed with a percentage of fault.

In other words, according to Laskin J.A., if a court finds that P was 10 percent responsible for her loss, D1, 50 percent, and D2, who was not sued, 40 percent, then D1 will have judgment against her for 90 percent, and has the burden of attempting to recover from D2 the 40 percent attributable to her.

It is not proposed, however, to pursue this question further in this chapter, since it relates principally to the apportionment of loss between the injured person and a wrongdoer. It is considered in chapter 10, which deals with contributory negligence and a number of the contribution consequences.[48]

The other problem to be mentioned is the effect that the insolvency of one wrongdoer may have upon the division of the contributable sum. The Commission has already recommended that, where there are two wrongdoers, the solvent one should bear the entire loss, but that, where there are more than two, the share of the insolvent wrongdoer should be divided among the wrongdoers in proportion to their share of the fault. The plaintiff should not be required, irrespective of whether or not she was contributorily at fault, to bear the burden of the insolvency in proportion to her own culpability.[49]

4. THE DIVISION OF THE CONTRIBUTABLE SUM: QUANTIFYING THE PORTIONS

(a) The Present Law

The final question considered in this chapter is the amount that those who are liable to contribute should be required to pay towards the contributable sum. The Ontario *Negligence Act* provides in section 2 that each of two

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[46] *Bennetto and Bennetto v. Leslie and Werby*, [1950] O.R. 303 (H.C.J.); *St. Catharines Flying Club v. The City of St. Catharines*, [1953] O.R. 393 (C.A.); *Roustauskas v. Wilson*, [1952] O.W.N. 441 (H.C.J.); and, *semble*, *Paquette v. Batchelor* (1980), 28 O.R. (2d) 590, 111 D.L.R. (3d) 642 (H.C.J.).

[47] [1968] 1 O.R. 333, at 341, 66 D.L.R. (2d) 396 (C.A.).

[48] *Supra*, ch. 10, sec. 5.

[49] See *supra*, ch. 3, sec. 4.

or more tortfeasors who have caused damage to an injured person and are found to have been at fault or negligent is liable *in solidum*, but, "as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent". Thus, while a person's tortious conduct may be only one of several causes of the plaintiff's loss, provided that it was one of the causes in law, the plaintiff is entitled to recover the full amount of her loss from that person alone. However, by showing that the tortious conduct of others also contributed to the plaintiff's loss, the defendant may be able to distribute part of that loss to those others. It becomes relevant at this stage to determine the degree of fault that can be attributed to each of the wrongdoers who are before the court.

Section 3, as we have seen, deals with the right to recover contribution by a person who has settled with the injured person. The section does not expressly provide that the sum awarded is to be based upon an evaluation of the parties' respective degrees of fault, but this is surely implicit. In the event that it is not practicable for the court to quantify the degree of fault or negligence attributable to each of the tortfeasors, section 5 provides that the parties to the claim for contribution are regarded as equally at fault, and that the contributable sum is to be divided equally between or among them. This section applies whether the claim is made following a judgment or a settlement.

No significant legal difficulties appear to have been experienced with the operation of the apportionment principles currently contained in the *Negligence Act*. Courts approach the question by considering the comparative fault of the tortfeasors, and assessing the extent to which each deviated from the standard of conduct by which their liability is determined.[50]

For the purposes of contribution, a court may fix the proportion of fault attributable to the parties to the claim. The task of quantifying degrees of fault is essentially factual in nature. Where the trial is before judge and jury, it is for the jury to decide how the liability should be apportioned. Appellate courts are reluctant to disturb findings made at trial on this question, in the absence of a clear error of principle or an apportionment that is unreasonable or manifestly erroneous. Thus, in *Taylor v. Asody*,[51] Dickson J. (as he then was), dissenting, said:

> Apportionment of fault is primarily and properly a matter within the discretion of the trial judge who has, as has so often been pointed out, the great advantage of seeing and hearing the witnesses, of observing demeanour, noting nuances of expression, detecting dissimulation. . . . *[E]xcept in a strong and*

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[50] Many of the cases are collected in Cheifetz, *supra*, note 43, at 99-105. For a recent example, see *Consumers' Gas Co. v. The Corp. of the City of Peterborough and Peterborough Utilities Comm.*, [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507, in which it was held that a negligent tortfeasor was not entitled to an indemnity from a defendant (who was found to have been more at fault) to whom the claimant also owed a duty of care.

[51] [1975] 2 S.C.R. 414, at 423, 49 D.L.R. (3d) 724 (emphasis added) (subsequent reference is to [1975] 2 S.C.R.).

> *exceptional case*, an appellate court will not feel free to substitute its apportionment of fault for that made by the trial judge unless there has been *palpable and demonstrable error* in appreciation of the legal principles to be applied or misapprehension of the facts by the trial judge.

A somewhat broader appellate standard of review may be applied in non-jury actions where the dispute concerns the inferences to be drawn from the evidence, rather than a question of credibility.[52]

The cases in which the scope of section 5 has been discussed contain little that is not evident from a reading of the statute itself.[53] For example, it has been held that the power to apportion fault equally where it is not practicable to determine specific degrees of fault does not release the court from first deciding whether the parties were liable at all to the original person.[54] It may not be practicable to ascribe a specific degree of fault because the evidence is insufficiently cogent to reach a final conclusion about the relevant events or conduct.[55] Similarly, the parties' conduct may have been so inextricably intertwined that it is not practicable to assess the culpability of each separately.[56] It is not certain whether section 5 should apply to a case in which it is clear that the parties were not equally to blame, but where the jury is unable to agree how their respective degrees of unequal fault should be quantified. The appropriate procedure in such a case may be to order a new trial.[57] Whether an apportionment is "practicable" is a question of fact to be decided on the balance of probability.

(b) Reforming the Law

(i) General

No doubt there will be many cases in which judges or juries experience real difficulty in apportioning liability among tortfeasors. The reason is that the exercise necessarily contains elements of subjective judgment and appreciation, not to say a degree of arbitrariness, which may in part explain why appellate courts have been reluctant to overturn assessments made at

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[52] See, generally, Cheifetz, *supra*, note 43, at 286-97.

[53] They are briefly discussed by Cheifetz, *ibid.*, ch. 4.

[54] *Waring v. Jarvis*, [1956] O.W.N. 661 (C.A.), and *Binda v. Waters Construction Co. Ltd. and Hunchuk* (1960), 24 D.L.R. (2d) 431 (Man. C.A.).

[55] It may be impracticable to attribute a determinate degree of fault to the parties because the evidence given by witnesses is incomplete or lacking in credibility (*Taylor v. Asody*, *supra*, note 51, at 424), or because the evidence, while credible, is not sufficiently clear to enable a court to draw an inference with the appropriate degree of confidence (*Potan v. Keleher* (1975), 9 O.R. (2d) 289, at 298, 60 D.L.R. (3d) 217 (C.A.)).

[56] *Malenfant and Beetham v. McKee and Taylor*, [1953] O.W.N. 652 (C.A.), at 655, rev'd on other grounds [1954] S.C.R. 651.

[57] *Magee v. Johnson*, [1954] O.W.N. 141 (Co. Ct.).

first instance. It will often be the kind of issue upon which more than one view can reasonably be held. The institutional characteristics of an appellate court do not guarantee that the quality of the decision will be sufficiently improved to justify a redetermination.

There are two considerations that suggest that the legal basis for apportioning the loss ought to be reviewed in this Report. First, the *Negligence Act* currently contains a rather narrower criterion than that found in other jurisdictions, including those in which the question has recently been re-examined. Secondly, if the recommendations in this Report are accepted, and the scope of the right to contribution is expanded so that it potentially applies to all concurrent wrongdoers, and not just tortfeasors, then the current basis of apportionment may be inadequate to deal satisfactorily with the new range of situations to which it will have to be applied. It should also be remembered that, until quite recently, it was widely thought that the *Negligence Act* applied only to the tort of negligence or, at most, to torts in which negligent conduct is an element.[58] There is little evidence about the way in which the apportionment provisions of the *Negligence Act* apply to intentional torts and torts of strict liability.[59]

No doubt litigation involving negligent defendants is likely to continue to provide the overwhelming majority of cases in which respective degrees of fault will have to be apportioned. Nonetheless, there will be occasions in which the court will be required to determine how liability should be apportioned among those whose liability, for example, in tort or contract, is strict, or based on negligence or intentional conduct. Should it be an invariable rule that the wrongdoer whose liability to the injured person does not depend upon some negligence or morally culpable conduct should be entitled to contribution from a person who has been negligent? And is the negligent wrongdoer invariably entitled to contribution from the intentional wrongdoer, and, if not, how should the loss be apportioned? When the liability of one concurrent wrongdoer depends upon breach of contract, comparative fault may prove to be both too elusive and too narrow a standard to provide satisfactory solutions.[60]

The almost limitless range of fact situations in which an apportionment of liability will have to be made inevitably suggests that this is an area where the Legislature should leave considerable discretion to the court of original

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[58] *Supra*, ch. 4, sec. 3(a)(ii).

[59] For a recent example in which the court held dishonest tortfeasors liable for 90% of the plaintiff's loss, and those who had been negligent, 10%, see *Anderson and G.W. Anderson Holdings Ltd. v. Stevens* (1981), 125 D.L.R. (3d) 736, [1981] 5 W.W.R. 550 (B.C.S.C.).

[60] Some of these questions were considered in the New Zealand *Working Paper on Contribution in Civil Cases*, *supra*, note 14. In that Working Paper, the New Zealand Contracts and Commercial Law Reform Committee tentatively proposed that the difficulties could be minimized by confining the right of contribution to wrongdoers whose relationship created "any sort of legal or moral duty or obligation as between them" (*ibid.*, at 11). However, the insuperable task of defining this condition precedent led the Committee to abandon it. See, generally, paras. 3.1-3.6, at 10-15.

jurisdiction, and where appellate courts should be slow to substitute their judgment for that of the judges of first instance. Having said this, however, it is still necessary to consider to what extent the discretion should be structured. Detailed rules may be impracticable, but a listing of the factors to be taken into account may be feasible. Ease of application may support a very narrow range of considerations that a court is directed to consider; multiple factors not only expand the scope of the inquiry by increasing the matters that are relevant, but also may present difficult questions of assessing the weight to be given to them, and deciding whether some factors should be more important than others and, if so, which ones. One facet of justice is the formulation of rules that can be applied reasonably easily, predictably, and efficiently, so that the costs of administration do not outweigh whatever improvement there may be in the quality of decisions made in individual cases.

(ii) Approaches to Reform

It is relevant to note at this point the recommendations contained in the Ontario Law Reform Commission's recent *Report on the Law of Trusts*.[61] Two aspects of the Commission's conclusions respecting contribution among trustees, who are jointly and severally liable to a beneficiary for a breach of trust, are of particular relevance here. First, the Commission proposed that the court's power to order contribution should be broader than it currently is: the court should not be limited to dividing the liability equally among the trustees, or, in the few situations in which equity does not require this, to providing that one trustee must indemnify her co-trustees. It recommended that these unduly rigid rules should be repealed. Secondly, the Commission proposed a standard for apportioning the loss that is different from that in the *Negligence Act*, and that may authorize the court to consider a range of factors broader than comparative fault. Thus, section 54(1) of the Commission's proposed draft *Trustee Act*, which was contained in its Report, provided as follows:

> 54.—(1) Subject to any express limitation of liability in the trust instrument or to any express provision in the trust instrument as to contribution or indemnity, the proportions in which co-trustees in breach of trust are liable as between themselves for making good the loss to the trust or the amount of contribution which may be recovered by a trustee from any co-trustee are *such as may be found by the Court to be just and equitable having regard to the extent of the responsibility of each trustee in breach for the loss caused*.

It will be recalled that section 2 of the *Negligence Act* requires apportionment to be awarded "in the degree in which D1 and D2 are respectively found at fault or negligent". As will become apparent from the following discussion, comparative *responsibility* may be a broader concept than comparative *fault* or *negligence*, and may thus require the consideration of a wider range of factors.

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[61] Ontario Law Reform Commission, *Report on the Law of Trusts* (1984), Vol. II, at 374-87.

Section 2(1) of the United Kingdom *Civil Liability (Contribution) Act 1978*[62] provides that, subject to any limitation upon the liability of one concurrent wrongdoer that is imposed by statute, contract, or by the contributory negligence of the injured person, "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". Subsection (2) makes it clear that the court's power includes granting 100 percent contribution to one person and requiring another to contribute 100 percent to the other concurrent wrongdoers. These provisions implemented the recommendation of the English Law Commission that the corresponding provision in section 6(2) of the *Law Reform (Married Women and Tortfeasors) Act, 1935*[63] should be retained and extended to all concurrent wrongdoers, whatever the legal nature of their liability to the injured person.[64]

English courts have held that the notion of "responsibility" requires consideration of both the causative potency of the conduct that caused the loss, and the comparative culpability of the parties.[65] It now seems as if the courts attach greater weight to the second of these factors,[66] although at one time there was a line of authority that made the degree of causation the only consideration.[67] It would be wrong to overestimate the practical differences that flow from preferring one factor over the other; the modern emphasis on comparative fault may, however, be attributed to the difficulty of assessing which conduct was the more closely causally connected to the injury.[68] Despite this latter difficulty, and any problem that there may be in deciding which factor is the more important, it may be arguable that both should be retained. Indeed, the American Uniform Comparative Fault Act[69] specifically directs the trier of fact, when determining the percentage of fault, to consider "both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed".[70]

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[62] *Supra*, note 15.

[63] *Law Reform (Married Women and Tortfeasors) Act, 1935*, c. 30 (U.K.).

[64] Law Commission Report, *supra*, note 16, paras. 68-69, at 20.

[65] *Driver v. William Willett (Contractors) Ltd.*, [1969] 1 All E.R. 665 (Sussex Assizes)

[66] *Maxfield v. Llewellyn*, [1961] 1 W.L.R. 1119, [1961] 3 All E.R. 95 (C.A.).

[67] See, for example, the judgments of Hilbery J. in *Daniel v. Rickett, Cockerell & Co., Ltd. and Raymond*, [1938] 2 K.B. 322, [1938] 2 All E.R. 631, and *Collins v. Hertfordshire County Council*, [1947] 1 K.B. 598, [1947] 1 All E.R. 633.

[68] The conceptual difficulties inherent in assessing comparative causative potency are noted in Williams, *Joint Torts and Contributory Negligence* (1951), at 157; Chapman, "Apportionment of Liability Between Tortfeasors" (1948), 64 Law Q. Rev. 26; and Klar, "Contributory Negligence and Contribution Between Tortfeasors", in Klar (ed.), *Studies in Canadian Tort Law* (1977) 145, at 156-57.

[69] *Supra*, note 13.

[70] *Ibid.*, §2(b).

Examples of situations where a comparison of the degrees of causation may influence the amount awarded by way of contribution may include the following. Suppose that scaffolding erected on a building site by D1 collapses and injures P. The injury is caused by both D1's failure to comply with the relevant regulations, for which D1 is strictly liable, and the negligence of D2, a contractor whose employee carelessly backed a truck into the scaffolding. If the assessment were made strictly on the basis of comparative fault, then D1 would be entitled to 100 percent contribution from D2, even though the negligence imputed to D2 might well not have caused the collapse if D1 had constructed the scaffolding in accordance with the regulations. Or suppose that P has engaged D2 to design and build a boat, and has employed D1 to supervise its construction and to inspect the finished product. The boat's design is defective, and the boat is negligently built. D1 fails to notice the defects when it is delivered to P. Even though there was no significant difference in the extent to which D1 and D2 departed from their respective duties of care, it may be appropriate to attribute more than half the responsibility to the designer and builder.[71]

The Alberta Institute of Law Research and Reform chose "responsibility" as the criterion of apportionment.[72] As we have seen, this allows a court to consider both causation and fault. However, it decided to depart from the formula found in the 1978 English Act by omitting any reference to a "just and equitable" apportionment; it thought that these words conferred too much discretion upon the court.[73]

If the test prescribed in the Ontario *Negligence Act* were retained and applied to all cases of concurrent civil liability, this would confine the court to considering comparative degrees of fault. An obvious advantage of limiting the court's consideration to comparative degrees of fault when determining the amount payable by way of contribution is that Ontario lawyers and judges are already familiar with this criterion, and there is no evidence of any real difficulty with its application.

Section 21(2) of the Irish *Civil Liability Act, 1961*[74]—which, like the recommendations made in this Report, extends the rights of contribution to all concurrent wrongdoers—contains an amalgamation of the English and the Ontario formulae. It provides that the amount of contribution recoverable from any contributor shall be such as may be found by the courts to be

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[71] This and similar fact situations are discussed in the New Zealand Working Paper, *supra*, note 14, where it is argued that a person whose "wrong" consists of not adequately protecting the injured person from another's breach of duty should be regarded as less responsible for the loss than the other: see para. 3.4, at 14, and, generally, paras. 3.1-3.6, at 10-15.

[72] Alberta Report, *supra*, note 11, at 77-78.

[73] The Institute appears only to have considered "just and equitable" as a standard unqualified by a direction concerning the factors to which a court should have regard in reaching its decision.

[74] *Supra*, note 10.

"just and equitable"; however, in applying this standard, the courts are to have regard "to the degree of the contributor's fault".

The Canadian *Uniform Contributory Fault Act*[75] appears to limit the range of factors that a court may consider in apportioning the loss. It provides that contribution is to be assessed in a way "that is proportionate to the degree to which the wrongful act of the other concurrent wrongdoer contributed to the damage".[76] It is not altogether clear what this means, although it may be interpreted as requiring the courts to consider only the respective degrees of causation of the wrongdoers' conduct, and not their comparative fault. If this is so, then it is difficult to understand the reasoning underlying it, particularly given the well-documented problems likely to be faced by the courts in determining the percentages of comparative causation that should be attributed to the parties.

At the other extreme, the standard for apportionment might be framed so as to give maximum discretion to the court by specifying no more than that apportionment should be based on what is just and equitable in all the circumstances. However, guidance in the exercise of the discretion could be given by the compilation of an exhaustive or a non-exhaustive list of matters to be taken into consideration. These would include the parties' comparative fault and the causal potency of their conduct. Other factors that might be considered are the extent to which one wrongdoer has profited from his breach of duty,[77] and the respective ability of the parties to distribute the loss efficiently—for example, through insurance.

(c) Conclusions

In choosing from among the various models, described above, for apportioning the loss among concurrent wrongdoers, a number of competing considerations have to be taken into account. First, the principles should be both substantively just and appropriate, and consistent with the existing bases of civil liability. One difficulty in formulating the applicable principles with any precision is that it will not be easy to anticipate the variety of situations in which the proposed extension of the right to contribution will have to be applied. This leads to a second consideration: to what extent should any legislation entrust trial judges, subject to a right to appeal that is likely to be narrow in scope, with discretion to develop the relevant principles on a case-by-case basis? The need for discretion in this area has been recognized in other jurisdictions, although there seems to be no

[75] *Supra*, note 12.

[76] *Ibid.*, s. 8(1).

[77] This might be particularly relevant to those whose wrong consisted of a breach of fiduciary duty, although it need not be confined to this category of civil liability. One of the exceptions to the equitable rule that trustees are entitled and liable to contribute equally to a loss for which they are concurrently liable is that a trustee who has benefited from the breach of trust is liable to indemnify the co-trustees. See *Bahin v. Hughes* (1886), 31 Ch. D. 390 (C.A.), at 395-96.

consensus on the extent to which it is desirable or feasible to structure that discretion. If flexibility and the ability to tailor the right to a wide and, in part, unpredictable range of fact situations are the positive aspects of discretion, there are also costs. These potentially include a lack of predictability, and inconsistency. In addition, considerable delays and expense are likely to attend a statutory regime that authorizes courts to undertake inquiries of wide and ill-defined scope about the parties and their conduct, the result of which may prove inconclusive and unsatisfying.

The interests of ease of administration and certainty could be given priority by providing that the loss should be apportioned equally between the claimant for contribution and the contributor. However, we are satisfied that this would be too blunt an instrument, and would often cause substantial injustice by treating alike parties whose conduct requires that they should be treated differently. The relevance of fault in imposing and apportioning liability is too deeply embedded in the law of civil obligation to be disregarded in this context. Nonetheless, equal division may be the only course available when other criteria do not yield any other scheme of apportionment. We therefore recommend the retention of a type of provision similar to that currently contained in section 5 of the *Negligence Act*.

As to the test to be applied by the court initially, we are of the view that the formula now contained in the *Negligence Act* is inadequate and, therefore, ought to be replaced. The power of the court to consider only the comparative degrees of fault of the wrongdoers, thereby making any of the other considerations mentioned above strictly irrelevant, is too narrowly circumscribed. Even if, as may be argued, it would be disingenuous to think that the notion of fault is not sufficiently flexible to allow a judge to view the fact situation as a whole, we cannot see any reason why the legislation should not provide clearly for such flexibility.

The "responsibility" test is, on the other hand, of sufficient flexibility to permit a consideration of both the causative factor and the fault of the parties. As we have seen, the United Kingdom *Civil Liability (Contribution) Act 1978* and the Alberta Institute of Law Research and Reform, as well as this Commission, in its 1984 *Report on the Law of Trusts*, have adopted the "responsibility", rather than the fault, test. Moreover, both the proposals of this Commission in 1984 and the United Kingdom legislation go further by recommending or providing that the amount recoverable in a contribution action is such as may be found by the court to be "just and equitable", having regard to the extent of the "responsibility" of each party.

We are of the view that this comprehensive approach—incorporating the notion of a "just and equitable" determination in the context of the "responsibility" test—is the appropriate one for Ontario. Unlike the Alberta Institute, we do not believe that giving the court power to make an order that is "just and equitable" confers excessive discretion on the court. Rather, such jurisdiction would allow the court to arrive at a more finely balanced

apportionment of liability. We believe this to be particularly important in the light of our earlier proposal to extend a right to contribution beyond concurrent tortfeasors to all concurrent wrongdoers.

Accordingly, the Commission recommends that the amount of contribution recoverable from a concurrent wrongdoer should be such as may be found by the court to be just and equitable, having regard to the degree of responsibility of each concurrent wrongdoer for the damage caused.[78] If the degree of responsibility of a concurrent wrongdoer cannot be determined in relation to another concurrent wrongdoer, they should be deemed to be equally responsible.[79] The determination of the degree of responsibility attributable to each party should be regarded as a question of fact.[80]

In chapter 4, the Commission recommended that the criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant included a penal or punitive element, should not automatically bar a right of contribution.[81] We recommend here, however, that such factors should be relevant to the court's exercise of its discretion concerning the quantum of contribution awarded.

We wish to make one final comment on the proposed test to be applied by the court in contribution proceedings. As we indicated in chapter 1, section 2 of the present *Negligence Act* countenances a right to an "indemnity"—that is, 100 percent contribution—in such proceedings. This result would, we believe, be all the more possible under the broader apportionment test proposed in this chapter, since the court would be given a relatively wide discretion to make a contribution award that is "just and equitable", having regard not simply to the fault of D1 and D2, but rather to their respective degrees of "responsibility". For example, while the fault principle alone might dictate at least some recovery for a particular concurrent wrongdoer, it is envisaged that, under certain circumstances, that wrongdoer may quite appropriately be entitled to no award whatsoever where his responsibility for the loss far exceeds the very minimal degree of fault attached to the conduct of the other wrongdoer. Accordingly, we recommend that, in determining the amount of responsibility of a concurrent wrongdoer, the court should be entitled to find any degree of responsibility, including responsibility for none or all of the damage.[82]

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[78] Draft Act, s. 9(1).

[79] *Ibid.*, s. 9(3).

[80] *Ibid.*, s. 22.

[81] *Supra*, ch. 4, secs. 3(a)(v) and 3(b)(iv)a.

[82] Draft Act, s. 9(2).

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Where contribution is sought on the basis of a full settlement made between the injured person and the claimant, the contribution payable by the contributor should be calculated by reference to the value of the consideration given for the settlement, which the claimant must establish it was in all the circumstances reasonable for her to give. If the claimant does not establish that the consideration actually given was reasonable, the contribution payable by the contributor should be based on the court's determination of the value of the consideration that it would have been reasonable for the claimant to have given.

2. Where the claimant for contribution has settled the injured person's claim by performing services or delivering goods, the court in contribution proceedings should be required to value these in order to determine whether the claimant has settled for a reasonable amount.

3. If a wrongdoer has settled the injured person's claim against him in such a way that the injured person may proceed against those concurrently liable with the settling wrongdoer, the contributable sum should be calculated in the way described above, but,

   (a) if a claim for contribution is made by or against the settling wrongdoer by a third party claim incidental to an action brought by the injured person against a concurrent wrongdoer, the contributable sum should be the amount of their common liability as determined by the court in that action; and

   (b) if the non-settling wrongdoer is sued by the injured person, and subsequently claims contribution from the settling wrongdoer in an independent action, the contributable sum should be the amount of the common liability as determined by the court in that action.

4. If the terms of the settlement provide for the performance of services or the delivery of goods, these should be required to be valued by the court in order to determine the amount of contribution recoverable.

5. Where the injured person has obtained judgment against concurrent wrongdoers in separate proceedings and the damages of the injured person have been assessed differently, in a claim for contribution by one wrongdoer against another wrongdoer the court should be required to determine the sum to which the parties to the contribution claim shall contribute, without reference to the findings on damages in the earlier litigation.

6. In determining contribution among concurrent wrongdoers, the court should disregard the fact that some other person, who is not a party to the contribution proceedings, might also be concurrently liable to the injured person.

7. (1) The amount of contribution recoverable from a concurrent wrongdoer should be such as may be found by the court to be just and equitable, having regard to the degree of responsibility of each concurrent wrongdoer for the damage caused.

   (2) If it is not practicable for a court to make such an assessment, each should be determined to be equally responsible and liable to pay an equal amount by way of contribution.

   (3) The determination of the degree of responsibility attributable to each party to a claim for contribution should be regarded as a question of fact.

   (4) While the criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant include a penal or punitive element, would not automatically bar a right of contribution (see chapter 4, Recommendation 1(2)), such factors should be relevant to the court's exercise of its discretion over the quantum of contribution awarded.

   (5) In determining the degree of responsibility of a concurrent wrongdoer, the court should be entitled to find any degree of responsibility, including responsibility for none or all of the damage.

CHAPTER 9

SOME PROCEDURAL ASPECTS OF CONTRIBUTION CLAIMS

1. INTRODUCTION

In the previous chapters of this Report, we have considered the principal substantive aspects of claims to contribution among persons from whom an injured person has a legal right to recover compensation for a single ioss that he has sustained. Thus, we have examined the circumstances in which a claim for contribution may arise, the essential elements of the right, contribution claims made following a settlement with the injured person, defences that may be available to the person from whom contribution is sought, and the principles governing the quantification of the amount of contribution payable. In this chapter, we shall examine some procedural aspects of the enforcement of the right to contribution.

We should point out that we do not propose to deal exhaustively with every provision of the Rules of Civil Procedure[1] that relate to contribution claims. For instance, a right to contribution based upon the concurrent liability of civil wrongdoers for a single loss will normally be asserted through a third party claim or, where the parties to a contribution claim are co-defendants to the main action brought by the injured person, by a crossclaim by one defendant against another. The procedures governing these kinds of proceeding have recently been exhaustively reviewed, and the product of that review is now to be found in the new Rules of Civil Procedure.[2] It would be inappropriate for the Commission to re-examine the general features of the relevant procedures, even though claims for contribution among concurrent wrongdoers are likely to prove one of the most frequent kinds of claim to which these procedures will apply.

The Commission has therefore tried to isolate, and to focus its attention upon, those aspects of civil procedure that appear to be unique, or virtually unique, to claims for contribution among wrongdoers. The three topics identified by the Commission as especially deserving of attention in this project are the rule in *Cohen v. S. McCord & Co. Ltd.*,[3] the limitation period

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[1] Rules of Civil Procedure, O. Reg. 560/84.

[2] On third party claims, see, generally, Rules of Civil Procedure, *ibid.*, R. 29. Rule 28 deals with crossclaims.

[3] [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.).

governing contribution claims, and the earliest time at which an order for contribution may be executed. Of these, the first is likely to be the most controversial and important.

2. PROCEEDINGS FOR CLAIMING CONTRIBUTION

(a) THE PRESENT LAW

A claim for contribution by one concurrent wrongdoer against another may be made in a variety of procedural forms, the most important of which may be outlined briefly as follows.

(i) Claims Against Co-Defendants

When P has made D1 and D2 co-defendants, and D1 claims contribution from D2, or D1 and D2 claim contribution for each other, under the *Negligence Act*[4] the claim must now be made by way of a crossclaim, which must be included in the same document as the defence to the action.[5] The Rules of Civil Procedure in this respect largely codify the previous case law, which had held that a claim for contribution under the *Negligence Act* made by one co-defendant against another should not generally be made by the issue of a third party notice.[6] By making a crossclaim a necessary condition for the assertion of a claim for contribution under the *Negligence Act*, it may no longer be sufficient if the statement of defence, without expressly including a crossclaim, alleges facts that make it clear that the claimant is seeking to impute to a co-defendant responsibility for the plaintiff's loss, and is claiming contribution.[7]

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[4] *Negligence Act*, R.S.O. 1980, c. 315.

[5] Rules of Civil Procedure, *supra*, note 1, r. 28.01(2).

[6] *Thompson v. The Toronto Transportation Commission*, [1947] O.W.N 920 (Sen. Master S.C.O.); *Samis v. Toronto Transit Commission*, [1955] O.W.N. 523 (Sen. Master S.C.O.); *Randall's Paints Ltd. v. Tanner*, [1969] 2 O.R. 169 (H.C.J.); and *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1974), 3 O.R. (2d) 481 (H.C.J.), and (1976), 12 O.R. (2d) 201 (C.A.), at 220, aff'd (*sub nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*) [1978] 2 S.C.R. 1346.

For an exception, see *Attorney-General of Ontario v. Kibrick* (1974), 4 O.R. (2d) 313 (C.A.), where the defendant was held to have properly issued a third party notice to a person who had been named as a co-defendant to the plaintiff's action, but upon whom the plaintiff had not served the writ. See, also, *Slater Steel Industries Ltd. v. I.C.E. Combustion Systems Inc.* (1984), 46 O.R. (2d) 45 (H.C.J.), where third party proceedings, commenced after the main action "had effectively died" as a result of separate settlements between the plaintiff and the tortfeasors, were held to be an appropriate procedure for a defendant to claim contribution from a co-defendant.

See, generally, Cheifetz, *Apportionment of Fault in Tort* (1981), at 86-91.

[7] See, for example, *Samis v. Toronto Transit Commission*, *supra*, note 6, at 524, and *Sgro v. Verbeek* (1980), 28 O.R. (2d) 712, 111 D.L.R. (3d) 479 (H.C.J.).

The justification for dispensing with the need for a third party notice had been found by the courts in the language of the *Negligence Act*. Thus, it was said that by *requiring* a court to determine the degree of fault of each of two or more persons found at fault, what is now section 2, by its very terms, imposed a liability to pay contribution or indemnity accordingly. Moreover, the power conferred by section 6 to permit another person to be added as party defendant or third party is expressly limited to situations where the person sought to be added is not already a party to the action. By implication, therefore, the procedural step of issuing a third party notice was unnecessary where the person from whom contribution is claimed was already a party to the plaintiff's action.

(ii) Claims Against a Plaintiff

After some initial hesitation, the Court of Appeal in *Crowder v. Graham* held that a defendant may claim contribution under the *Negligence Act* from a plaintiff in the action without the necessity of serving either a counterclaim or a third party notice.[8] Contribution should normally be claimed in the statement of defence. There is authority for the proposition that the claim for contribution need not be expressly pleaded, provided that the statement of defence makes the substance of the allegation and claim clear, although a claimant for contribution who made his claim inferentially has been denied costs.[9]

When contribution is sought against a plaintiff in a capacity other than that in which he is suing, it may be necessary to do so by a third party claim, or by adding the contributor as a defendant to the main action. For instance, in *Emard v. Mason*,[10] the plaintiff sued the defendant under *The Fatal Accidents Act*,[11] but in order to claim contribution from the estate of the deceased, the defendant had to add the plaintiff as a defendant to the action in his capacity as administrator of the estate.[12]

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[8] *Crowder v. Graham*, [1961] O.W.N. 320 (C.A.) effectively narrowed the scope of the statement in *Carter and Carter v. Booth*, [1956] O.W.N. 812, 6 D.L.R. (2d) 83 (C.A.) that contribution should generally be claimed by way of a third party notice. Equally suspect are cases in which it had been held that a counterclaim was the appropriate procedure for claiming contribution from a plaintiff. See, for example, *Burslem v. The Toronto Transportation Commission*, [1948] O.W.N. 369 (Sen. Master S.C.O.), and *Heron and Heron v. Pearce*, [1956] O.W.N. 65 (Sen. Master S.C.O.), at 68.

[9] *Sgro v. Verbeek*, *supra*, note 7. See, also, *Durocher v. Tiffin*, [1960] O.W.N. 185 (Master S.C.O.).

[10] [1943] O.W.N. 378 (H.C.J.).

[11] R.S.O. 1937, c. 210.

[12] But see *Crowder v. Graham*, *supra*, note 8, where the plaintiff sued for damages on behalf of his injured child and in his personal capacity. No third party notice was required in order to enable the defendant to claim contribution under the *Negligence Act* for a breach of the plaintiff's duty of care on the child's parent. Compare *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

Under rule 27.01 of the new Rules of Civil Procedure,[13] a defendant may assert a counterclaim against the plaintiff. The counterclaim must be included in the same document as the statement of defence,[14] and is not now normally to be treated as an originating process. It should be noted that rule 27.01 appears to be of general application and contains no specific exemption for contribution claims made under the *Negligence Act*. It is possible, therefore, that *Crowder v. Graham* will no longer be followed.[15]

(iii) Claiming Contribution by Adding a Party to the Action

If the injured person has named only D1 as a defendant, and D1 believes that he may be entitled to contribution from another whose wrongful conduct was also a cause of the loss for which P is suing D1, the normal method of asserting this claim is by way of a third party claim.[16] Alternatively, a person who may be liable for contribution, but who was not initially made a defendant to the plaintiff's action, may be joined subsequently as a party defendant.

The relevant statutory provision is section 6 of the *Negligence Act*, which states:

> 6. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are deemed just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties.

In its original form, this provision applied only to the addition another as a party defendant, and not as a third party.[17] Nonetheless, in *Sauriol v. Summers*,[18] the Court of Appeal concluded, though neither unanimously nor unhesitatingly, that a defendant could bring in another as

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See, also, *Peter v. Anchor Transit Ltd.* (1979), 100 D.L.R. (3d) 37, [1979] 4 W.W.R. 150 (B.C.C.A.), where P1, an infant, and P2, his father, sued D for an injury suffered by P1. D's defence was that P2 and P1's mother were partly responsible for the accident. It was held that a third party notice was required for the claim for contribution against the mother, who was not a party, but not against P2.

[13] *Supra*, note 1.

[14] *Ibid.*, r. 27.02.

[15] Note, too, that under r. 27.01(2), a defendant who is counterclaiming is permitted to join as a defendant a person who is not a party to the main action. In this connection, see, also, r. 27.03.

[16] When the tortfeasors are liable for distinguishable parts of the plaintiff's loss, the service of a third party notice claiming contribution is inappropriate: *Katzman v. Yaeck* (1981), 33 O.R. (2d) 597, 125 D.L.R. (3d) 270 (H.C.J.). This decision was reversed on appeal on the ground that the third party *may* have been concurrently liable with the defendant for a part of the plaintiff's injuries: (1982), 37 O.R. (2d) 500, 136 D.L.R. (3d) 536 (C.A.).

[17] *The Negligence Act, 1930*, S.O. 1930, c. 27, s. 6.

[18] [1939] O.R. 253, [1939] 2 D.L.R. 297 (C.A.).

a third party, even though a settlement made between the plaintiff and the proposed third party had rendered the third party immune from a successful suit by P. The Court held that the machinery provided in the Act for the assertion of contribution claims between co-defendants was not clearly intended to be the sole procedural mechanism for enforcing the substantive right. An amendment to *The Negligence Act* in 1939[19] expressly provided for the issue of a third party notice in such a case, and thus gave a more solid foundation to the result reached in *Sauriol*.

Despite the breadth of the language of section 6, the courts have regularly held that a person may not be added as a party defendant at the instance of the defendant when the plaintiff objects. More explicit language would be needed to exclude the common law principle that the plaintiff is *dominus litis* and cannot be forced to sue a party against whom he chooses not to proceed.[20] Whether this is an absolute rule or merely a general principle to which there may be exceptions seems not to be a question of much moment, given the consistency with which courts have refused to depart from it. The only discordant note of any significance was struck by Rose C.J.H.C. in *Colville Cartage Co. Ltd. v. Smith Transport Ltd.*,[21] where he stated that, in the interests of procedural simplicity, persons not sued by the plaintiff should normally be brought in at the instance of the defendants as parties defendant and not third parties, where the sole purpose was to enable the defendant to obtain contribution. In the event, however, the Court did not disturb the decision below to add the respondents as third parties; moreover, this was a case in which the plaintiffs were indifferent to the capacity in which those served were brought into the action.

In order to add as a third party a person not sued by the plaintiff, the defendant must show only that the proposed third party is or *may be* responsible for the plaintiff's loss. A motion to strike out the addition of a third party is not the appropriate vehicle for deciding a difficult question of law upon which the primary liability of the third party may depend.[22] The inability of the defendant to institute proceedings for contribution other than through the third party procedure makes it particularly appropriate that third party notices should not be lightly refused or set aside.[23] While a person not named as a defendant by the plaintiff may not subsequently be

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[19] *The Statute Law Amendment Act, 1939*, S.O. 1939, c. 47, s. 23.

[20] *Timmins v. Taggart Services Ltd.*, [1940] O.W.N. 140, [1940] 4 D.L.R. 285 (H.C.J.); *Carter and Carter v. Booth*, *supra*, note 8; and *Krezanowski v. Scarborough*, [1961] O.W.N. 315 (Sen. Master S.C.O.).

[21] [1944] O.W.N. 527 (H.C.J.), at 530.

[22] *Healy v. Runnymede Iron and Steel Co.*, [1941] O.R. 133, [1941] 3 D.L.R. 325 (C.A.). See, also, the decision of the Court of Appeal in *Katzman v. Yaeck*, *supra*, note 16. For an unsatisfactory decision to the contrary, see *Cameron v. The Corp. of the City of Glasgow*, [1936] S.C. 26, [1936] 2 All E.R. 173 (H.L.); this decision is criticized by Williams, *Joint Tortfeasors and Contributory Negligence* (1951), at 181-82, and is specifically overturned by the Irish *Civil Liability Act, 1961*, No. 41, s. 27(3).

[23] *Peca Papp Ltd. v. Fitzpatrick*, [1967] 1 O.R. 565 (C.A.), at 570.

joined as a party defendant if it is clear that the plaintiff cannot successfully sue him to judgment, as we have seen he can nonetheless be added as a third party.[24]

An application to add a party under section 6 of the *Negligence Act* should not be made until the applicant has filed a statement of defence.[25] A third party notice may be served not only by the original defendant to the plaintiff's action, but also by a plaintiff against whom the defendant has claimed contribution.[26] Moreover, the third party may serve a notice upon other persons, whether or not they were parties to the original action, thus making them, in effect, fourth parties.[27] Fourth parties may also bring in fifth parties, and so on.

In addition to disputing his own liability to the defendant on the contribution claim, the third party may raise any defence available to the defendant against the claim made by the plaintiff.[28] For if the defendant is held not liable to the plaintiff, that will effectively preclude any liability of the third party to make contribution to the defendant. A third party who is permitted to defend the main action is bound by any order or determination made in it, as is a third party who does not deliver a statement of defence.[29] The Rules of Civil Procedure now also permit a third party to counterclaim against the parties to the main action.[30]

(iv) Claiming Contribution in an Independent Action

A defendant who has not been sued to judgment by the injured person may claim contribution in an independent action. The relevant provision of the *Negligence Act* is section 3, which states in part:

> 3. A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering

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[24] *Sauriol v. Summers*, *supra*, note 18.

[25] *Timmins v. Taggart Services Ltd.*, *supra*, note 20, and *Emard v. Mason*, *supra*, note 10.

[26] *Judson v. Vasilaras and Town of Lindsay*, [1971] 1 O.R. 290 (H.C.J.).

[27] *Toronto Asphalt Roofing Manufacturing Co. Ltd. v. Plate and Structural Steel Sales Ltd.*, [1950] O.R. 335, [1950] D.L.R. 552 (C.A.), and *Aetna Insurance Co. v. Mojan Ltee.* (1979), 27 N.B.R. (2d) 356, 106 D.L.R. (3d) 286 (C.A.).

[28] Rules of Civil Procedure, *supra*, note 1, r. 29.05(1).

[29] *Ibid.*, r. 29.05(2)(b) and (5).

[30] *Ibid.*, r. 27.10. However, an allegation by the third party that the defendant should be responsible for some or all of the plaintiff's loss will normally be made in the defence to the third party notice. Whether a counterclaim could be made by the third party against the plaintiff was previously unclear: *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1980), 29 O.R. (2d) 259, 112 D.L.R. (2d) 560 (C.A.) (the Divisional Court judgment appears at 29 O.R. 260 and 112 D.L.R. (2d) 561).

such damage, and thereafter commencing or continuing action against such tort feasor....

The substantive aspects of the right to contribution available to or against a person who has settled the claim of the injured person have been discussed in chapter 5 of this Report. In this chapter, our concern is with the procedural implications of the section. In a number of respects, the courts appear to have been willing to give a generous interpretation to the scope of this provision. Two factors can be identified as contributing to this phenomenon. First, the courts have been quick to support the policy underlying section 3, namely, that settlements should be encouraged by the law and that no unnecessary procedural barriers should be placed between the settling wrongdoer and other concurrent wrongdoers who have benefited from the settlement. Secondly, the consequences for a claimant of a court's decision that the machinery provided by section 3 is not available can be very serious, including the loss of an opportunity ever to be able to enforce the right to contribution.

This latter point refers, of course, to the rule in *Cohen v. S. McCord & Co. Ltd.*[31] that a person who is sued to judgment must normally claim contribution within the action by joining the potential contributor (D2) as a party defendant or as a third party. It is not surprising, therefore, to discover a number of cases in which claimants have resorted to the section 3 procedure in circumstances somewhat removed from the paradigm case of a prior settlement between the injured person and the claimant, which has made unnecessary the institution of litigation between them.

For instance, in *Kraft v. The Queen in right of the Province of Ontario*,[32] section 3 was held to be the appropriate procedure for the assertion of a right to contribution by persons who were defendants to a negligence action that was brought in New York following a road accident in Ontario. The defendants to the contribution claim applied to have the action struck out on the ground that, since there had been no settlement between the parties to the New York litigation, nor any finding of liability made, the claimants had failed to establish that they had yet acquired any cause of action. It was conceded that the claimants could not obtain contribution in the New York proceedings. The Court held that the action was not premature and that a claim under section 3 was in order, "notwithstanding that the precise amount with respect to which relief is sought, has not been finally determined".[33] Equally surprising is the fact that the Court was willing, without even adverting to the point, to conclude that section 3 was appropriate, even though it might be thought that a contribution claim based upon potential liability in a suit in a foreign court was not founded upon a "settlement" between the claimants and the injured persons.

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[31] *Supra*, note 3.

[32] [1972] 3 O.R. 684, 29 D.L.R. (3d) 275 (H.C.J.) (subsequent reference is to [1972] 3 O.R.).

[33] *Ibid.*, at 687.

The question of the timing of a section 3 action has been considered more recently in *Glass v. Avenue Dodge Chrysler*.[34] As a result of an automobile collision, the injured party sued D1 for damages. The parties settled this claim, but before the settlement was made D1 instituted proceedings under section 3 against D2 for contribution. D1 alleged in this action that D2's negligence in repairing the brakes of D1's car entitled D1 to contribution because D2 could have been sued by P, and, as between D1 and D2, D2 must bear at least a share of the responsibility. D2 moved that D1's statement of claim should be struck out as disclosing no cause of action: the wording of section 3 made it clear, it was argued, that proceedings could be instituted only *after* the claimant had settled with the injured person. The motion was disallowed on the ground that D1's cause of action for contribution arose when P sustained his injury, and that the provision in section 3 governing the time at which the claim for contribution could be enforced was merely procedural. Since P and D1 did in fact settle, the learned judge refused to regard as fatal to D1's action for contribution what was no more than a procedural irregularity that had not prejudiced D2.

The Court's reasoning that D1's cause of action arose at the date of the injury to P can be sustained on neither principle nor authority.[35] However, it is difficult to deny that the result is anything but satisfactory. One commentator[36] has sought to support the conclusion in *Glass* by reference to the wording of section 3, which speaks of D1 as "thereafter commencing or *continuing* action against such other tort feasor". The argument is that the word "continuing" must mean that the legislation contemplates the initiation of proceedings before the settlement is made. It is suggested, however, that a more plausible view is that the situation envisaged by the word "continuing" is one in which P has sued D1 and D2, or only D1, with D2 brought in as a third party, and after a settlement between P and D1, the action continues between D1 and D2 for the purpose of determining the issue of contribution.[37] The probable truth of the matter is that this question was not foreseen by the drafter of the legislation.

If one ignores for the moment the precise wording of section 3, there would not be anything peculiar about permitting a claimant for contribution to institute independent proceedings for contribution before making a settlement with the injured person. The fact that D1 has not yet agreed to pay a sum to P should no more bar a claim against D2 than the fact that D1 has not been held liable to P at the time he issues a third party notice to D2. Of

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[34] (1979), 26 O.R. (2d) 592, 10 C.C.L.T. 69 (Co. Ct.).

[35] See discussion *infra*, this ch., sec. 3(b).

[36] Cheifetz, *supra*, note 6, at 156-57.

[37] For an example of the use of s. 3 in this fact situation, see *Slater Steel Industries Ltd. v. I.C.E. Combustion Systems Inc.*, *supra*, note 6, where third party proceedings, commenced by one defendant against another after they had settled separately with the plaintiff, were held to be a permissible form of proceeding to assert a right of contribution under s. 3 of the *Negligence Act*, *supra*, note 4.

course, a person who obtains an order for contribution is not thereby necessarily entitled to enforce it immediately.[38]

One final point should be noted. It has been held that a consent judgment is a settlement within section 3.[39]

(v) The Rule in *Cohen v. S. McCord & Co. Ltd.*

Until comparatively recently, the Ontario *Negligence Act* has been interpreted as providing that a party who has been sued to judgment by P may claim contribution only within that action.[40] If the contributor is a co-defendant, the claim must be made in the statement of defence; if the contributor is not joined as a co-defendant to the plaintiff's action, contribution must be sought by a third party claim. This rule was first established in *Cohen v. S. McCord & Co. Ltd.*,[41] where P had sued D1 and D2. D2 and P then settled in the course of the trial. Counsel for D1 made no objection to this, stating that he did not intend to claim over against D2. The Court of Appeal dismissed a subsequent suit brought by D1 for contribution after he had been held liable to P. The Court reasoned that the *Negligence Act*, which at that time contained neither the current section 3 nor section 9,[42] created both the substantive right of contribution among tortfeasors and provided a complete procedural code for its vindication. Thus, by virtue of section 2, contribution could be claimed in the proceeding in which D1 and D2 were held liable to P. If P sued only D1, then the third party procedure expressly introduced into the Act in 1939[43] was the exclusive method for claiming contribution, even though the wording of the statute was permissive, not mandatory.

The rule established in this case has generally been accepted as the law in Ontario, and has been regarded as surviving the subsequent amendments

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[38] See *infra*, this ch., sec. 4.

[39] *Morello v. Henderson*, [1959] O.W.N. 121 (H.C.J.).

[40] See, generally, Cheifetz, *supra*, note 6, at 79-86.

[41] *Supra*, note 3.

[42] Section 9 reads as follows:

> 9. Where an action is commenced against a tort feasor or where a tort feasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tort feasor provided,
>
> (a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
>
> (b) there has been compliance with any statute requiring notice of claim against such tort feasor.

[43] See *supra*, note 19.

to the *Negligence Act*. The introduction of section 3, which allows D1 to institute proceedings for contribution following a settlement with P, even though he has not been held liable, might be thought to have removed one of the planks of the Court of Appeal's reasoning in *Cohen v. S. McCord & Co. Ltd.*, namely, that contribution could only be claimed in proceedings in which the liability of D1 to P was determined. It was also argued in *Rickwood v. The Town of Aylmer*,[44] the leading case decided after these amendments to the *Negligence Act*, that section 9, added after the decision in *Cohen*,[45] was inconsistent with that decision, because it envisaged the institution of contribution proceedings at some time after D1 had been held liable to P. *Rickwood*, like *Cohen* itself, was a case in which the contribution claimant and the contributor were parties to the main action. The Court nonetheless held that the rule in *Cohen v. S. McCord & Co. Ltd.* should still be followed. The rule has also been applied when P sues only D1.[46]

Despite its application in a number of cases, the future of the rule in *Cohen v. S. McCord & Co. Ltd.* is now somewhat uncertain.[47] This is largely the result of *dicta* in a judgment of the Supreme Court of Canada in *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*,[48] where the decision in *Cohen* was described as "unsatisfactory".[49] It was also pointed out that the addition to the *Negligence Act* of section 3 has made it clear that section 2 creates only a substantive right and does not determine the procedure by which it must be established. More recently, a judge of the High Court of Ontario has refused to follow *Cohen v. S. McCord & Co. Ltd.*, holding that section 9 clearly contemplates the possibility that contribution may be claimed in a separate action following a judgment in favour of the injured person against the claimant for contribution.[50] In this case, D1 had been refused an extension of time to serve a third party notice upon D2. Before the action between P and D1 had come to trial, D1 commenced an action for contribution against D2, which it was proposed should be tried with or immediately after P's action against D1. D2's application to have D1's action struck out was dismissed.

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[44] [1957] O.W.N. 243, 8 D.L.R. (2d) 702 (C.A.).

[45] *The Negligence Amendment Act, 1948*, S.O. 1948, c. 61, s. 3.

[46] *Paul Papp Ltd. v. Fitzgerald*, *supra*, note 23.

[47] An editorial note to the D.L.R. report of *Cohen v. S. McCord & Co. Ltd.*, at [1944] 4 D.L.R. 754, doubts whether the result is a justifiable interpretation of the language of the *Negligence Act*. The additions of ss. 3 and 9 can only have increased those doubts.

[48] *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193 (subsequent reference is to [1980] 1 S.C.R.).

[49] *Ibid.*, at 712. Pigeon J., writing for the majority, expressed grave reservations about the interpretation given to section 2 of the *Negligence Act* in *Cohen v. S. McCord & Co. Ltd.* Only in Ontario have the courts so interpreted the statute that creates a right of contribution among tortfeasors. Professor Glanville Williams has described the result in *Cohen v. S. McCord & Co. Ltd.* as "judicial legislation, based on very slender authority in the text of the *Negligence Act*": Williams, *supra*, note 22, at 185, *n.* 28.

[50] *Cristovao v. Doran's Beverages Inc.* (1983), 40 O.R. (2d) 737, 143 D.L.R. (3d) 641 (H.C.J.).

If *Cohen v. S. McCord & Co. Ltd.* is still the law in Ontario, there would seem to be at least one genuine exception to the rule that it establishes. If it is legally impossible for the primary rights and duties of the injured person and the defendants to be determined in the same proceeding as any contribution claim, the courts may allow the latter to be pursued in separate proceedings before the competent court. This possibility is created by the *Federal Court Act*,[51] which gives to the Federal Court exclusive jurisdiction over suits brought against the federal Crown, and concurrent jurisdiction over actions brought by the federal Crown and actions against servants and officers of the federal Crown. However, the Supreme Court of Canada, in a series of judgments, has taken a very narrow view of the constitutional power of Parliament to clothe the Federal Court with original jurisdiction.[52] The result is that a perfectly ordinary claim for damages made against a number of defendants, which include the federal Crown, may potentially give rise to the following separate proceedings: (1) an action against the federal Crown that must be brought in the Federal Court; (2) an action against the other defendants that can only be brought in the appropriate court in a province; (3) a claim for contribution that must be made against the federal Crown in the Federal Court by any defendants held liable to the plaintiff; and (4) a claim for contribution in a provincial court by the federal Crown.[53]

In *Bates v. Illerburn*,[54] Jessup J.A. was prepared to assume that *Cohen v. S. McCord & Co. Ltd.* did not bar a right to contribution that, by virtue of the *Federal Court Act* and the constitutional limits upon the Federal Court's jurisdiction, it was impossible to pursue in the main action. As we have seen, in *Kraft v. The Queen in right of the Province of Ontario*,[55] the Court treated a claim for contribution that could not be pursued in the main action before a foreign court as falling within section 3 of the *Negligence Act*. It is unclear whether the courts would be prepared to extend this reasoning to a situation where it was impossible, as a matter of practicality, for the claimant for contribution to issue a third party notice, because, for instance, he could not have known at the time when he was sued by P that there was another wrongdoer.

(b) Alternatives for Reform

Of the procedural aspects of contribution claims outlined above, the only one that the Commission considers should be reviewed is the rule in *Cohen v. S. McCord & Co. Ltd.* In other respects, the procedure appears to have attracted little criticism, and raises procedural questions that are by no means confined to claims for contribution among wrongdoers. In any

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[51] S.C. 1970-71-72, c. 1, s. 17. See *supra*, ch. 2, sec. 4(a).

[52] See Evans, "Federal Jurisdiction: A Lamentable Situation" (1981), 59 Can. B. Rev. 124.

[53] But see discussion *supra*, ch. 2, note 97.

[54] (1976), 12 O.R. (2d) 721, at 725, 70 D.L.R. (3d) 154 (C.A.).

[55] *Supra*, note 32.

event, as we have indicated, the general principles governing third party claims, crossclaims, and counterclaims have recently been the subject of extensive revision, and it would obviously be inappropriate to re-examine them as part of this project.

The principal procedural question relating to contribution among wrongdoers that is considered in this Report is whether the law of Ontario should prohibit a person who has been successfully sued to judgment by the injured person from claiming contribution in an independent action commenced outside the proceeding in which he has been held liable to the plaintiff. It has been noted that it is not altogether clear whether the interpretation of the *Negligence Act* adopted in *Cohen v. S. McCord & Co. Ltd.* is still good law. Even if the policy underlying that decision is to be retained, we believe that the Commission's proposed new *Contribution and Comparative Fault Act*[56] should deal with the point expressly. It is also possible that the extension of the right to contribution beyond concurrent tortfeasors may produce fact situations in which it will be more difficult than is currently the case under the *Negligence Act* for the contribution claimant to ascertain the existence of a concurrent wrongdoer. The changes in the law recommended in this Report may increase the occasions on which it would be unjust to require the claimant for contribution to pursue his claim within the main action brought by the injured person.

There are three principal approaches to reform that should be considered in this area. First, the proposed statutory reform of contribution among wrongdoers could include a provision to the effect that, as a general principle, any right to contribution against a concurrent wrongdoer following judicial determination of D1's liability to P must be made in the course of the proceeding brought by P against the contribution claimant (D1). However, an independent action for contribution could be brought where the court in which P sued D1 had no jurisdiction to determine a claim for contribution by D1 against D2, or following a settlement between P and D1, whether or not the settlement was embodied in a consent judgment. This would, in effect, be a statutory codification and generalization of the rule in *Cohen v. S. McCord & Co. Ltd.*, but it would also remove any doubt that the rule does represent Ontario law. A reform of this kind would also make it clear that a person should not be deprived of the right to contribution by virtue of his having been sued by the plaintiff in a forum where it was legally impossible to claim contribution within the principal proceeding.

The advantages of a reform of this nature are as follows. First, it avoids the difficulties and inconveniences of permitting many of the same issues to be litigated and relitigated in separate proceedings. Multiple litigation, with the possibility of inconsistent verdicts, is wasteful of court resources, costly for the parties, and likely to result in substantial delays. Secondly, it clarifies the present law and gives it a firmer statutory foundation. Thirdly, it eliminates the possibility that the present law may have the effect of

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[56] The proposed new legislation appears as an Appendix of this Report.

destroying a right to contribution where P sues D1 in a forum that cannot determine the question of contribution. Fourthly, by preventing D1 from claiming contribution from D2 after D1 has been sued by P, this proposed reform reduces the likelihood that D2 may have to pay contribution after the expiry of the period within which P must proceed against D2. Fifthly, it puts into statutory form a legal rule already familiar to Ontario practitioners, and one that appears in practice to cause few injustices.

The important question is whether the undoubted benefits that flow from minimizing the number of legal proceedings that can arise from a single loss suffered by the plaintiff are being purchased at too high a price. As indicated, the situations in which it would be unfair to deny D1 the right to bring an independent action for contribution may increase with the expansion of rights to contribution among concurrent tortfeasors, contract breakers, and those in breach of fiduciary duties. Thus, the fact that the plaintiff could have sued D2 in respect of the loss for which he has sued D1 may not be apparent to D1 until after he has been held liable to P.

A second approach, which has been followed in some jurisdictions, would be to adopt *Cohen v. S. McCord & Co. Ltd.* as the basic rule, but to soften its impact by conferring upon the court a discretion to permit the claim to proceed by way of an independent action. For example, section 27(1) of the Irish *Civil Liability Act, 1961*[57] provides that where D1 and D2 are sued in a single proceeding by P, they may claim contribution only in that action. Where D2 has not been joined by P, D1 must claim contribution by serving a third party notice "as soon as is reasonably possible". If no third party notice is served, the court in its discretion may refuse to make an order for contribution.

The Irish legislation gives no indication of the scope of the judicial discretion to refuse to award contribution where no third party notice has been served, nor the grounds upon which it may be exercised. However, Professor Williams, upon whose draft legislation the Irish statute is largely based, has stated that an independent action should be permitted only where it is impossible, as a practical matter, for the third party notice to be served.[58] Section 2(4)(b) of the South African *Apportionment of Damages Act, 1956*[59] indicates more clearly that claims for contribution by way of an independent action are to be very much the exception to the general rule: it provides that rights of contribution against persons who are not co-defendants shall be made by third party notice, "except with the leave of the court on good cause shown as to why notice was not given".

The advantage of an approach along these lines is that it attempts to preserve the benefits of *Cohen v. S. McCord & Co. Ltd.*, while, at the same

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[57] *Supra*, note 22.

[58] Williams, *supra*, note 22, at 185-86.

[59] 1956 S.S.A., No. 34.

time, permitting a court to mitigate the rule's Draconian consequences in cases where the contribution claimant would otherwise be denied an effective opportunity to assert his right. The difficulty is to find a verbal formula that prevents the exceptions from eroding the basic rule. In addition, to confer upon the courts an inadequately structured discretion, exercisable on a case-by-case basis, might introduce an unwarranted degree of uncertainty into the law.

A third option is to abolish the rule in *Cohen v. S. McCord & Co. Ltd.*, and allow the contribution claimant to elect to pursue his claim either within the main action or by an independent proceeding after he has been held liable to the injured person. Unnecessary multiple litigation could be discouraged by the imposition of a costs sanction upon a person who is unable to satisfy the court that he had good cause for claiming contribution in a separate proceeding.

Most jurisdictions, including some in which the matter has been reconsidered recently, impose no restriction upon the claimant's ability to seek contribution outside and subsequent to the main action. Section 4(a) of the American Uniform Comparative Fault Act[60] specifically allows a right to contribution to be enforced in the original action by the injured person, "or by a separate action brought for that purpose". In addition, the English Law Commission was satisfied with the broad framework of the *Law Reform (Married Women and Tortfeasors) Act, 1935*[61] and recommended no procedural changes.[62] Contribution, in English law, may be recovered from a concurrent wrongdoer either within the main action or in a separate proceeding.

The procedural issue under consideration has been specifically addressed by the Alberta Institute of Law Research and Reform, which has recommended against the adoption of the rule in *Cohen v. S. McCord & Co. Ltd.*[63] The reason given in the Institute's Report is that the undoubted advantages of ensuring that all the issues arising out of a single loss suffered by the injured person are determined in one piece of litigation, the outcome of which would bind all parties, are outweighed by the disadvantages of forcing defendants unnecessarily to add potential contributors as third parties. This, it is argued, would be likely to complicate unduly the prosecution of P's claim in what might otherwise be a straightforward case.[64] It

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[60] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1987 Pocket Part).

[61] C. 30 (U.K.).

[62] The Law Commission, *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977), para. 31, at 10.

[63] Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"), Recommendation 16, at 74.

[64] For a similar view, see Weir, 11 Int'l Enc. Comp. L. XI Torts (1983), ch. 12 (Complex Liabilities), at 76-77.

should be noted that the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada,[65] is silent on the issue. It may be inferred from this either that the Uniform Law Conference agreed with the Alberta Institute, or that the imposition of procedural restrictions upon the pursuit of a claim for contribution is regarded as a matter of individual choice for the provinces that adopt the uniform statute.

There are some advantages in abolishing the rule in *Cohen v. S. McCord & Co. Ltd.*, with or without a costs sanction. First, as the Alberta Institute has suggested, it would minimize the risk that the question of the secondary right of contribution would prejudice the vindication by the injured person of his primary right to obtain compensation from the defendant against whom he has chosen to institute proceedings. Secondly, it would avoid the unattractive possibility that D1's substantive right may be barred by a rigid procedural rule, or be made subject to the exercise of judicial discretion.

In attempting to assess the weight that should be attached to these arguments it ought to be borne in mind that adding a third party does not necessarily prejudice the plaintiff. The secondary rights and liabilities of D1 and D2 can often be determined when the issues in the main action have been decided, after which P, in effect, drops out of the picture. However, if the court rules that it is appropriate for the third party to defend against P's claim in the main action, the addition of the third party may well complicate P's action: to this extent, P's ability freely to choose his defendant will be limited. It is arguable that the plaintiff's interest in being able to select the defendant against whom he will proceed is adequately protected by his ability to prevent from being joined as a co-defendant to the main action a person whom a defendant wishes to be brought in as a party-defendant.

(c) Conclusions

The Commission is satisfied that the benefits of eliminating multiple proceedings are sufficiently clear that it is justifiable to impose more than a costs sanction to encourage parties to claim contribution within the main action.[66] We recommend, therefore, that where the contribution claimant and the contributor are parties to the injured person's action, contribution should be claimed by way of a crossclaim in that action in accordance with the relevant provisions of the Rules of Civil Procedure.[67] No subsequent claim for contribution outside the action should be permitted, except where the court that determines the liability to P of D1 and D2 has no jurisdiction

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[65] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

[66] For an example of judicial approval of *Cohen v. S. McCord & Co. Ltd.* in a jurisdiction where this is not the law, see *Inglis Ltd. v. South Shore Sales and Service Ltd.* (1979), 31 N.S.R. (2d) 541, at 557-59, 11 C.P.C. 127 (S.C., App. Div.).

[67] *Supra*, note 1. See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 19(1). The Draft Act appears as an Appendix of this Report.

to award contribution.[68] When the contributor is not a party to the action, contribution should normally be claimed only by way of a third party claim.[69] Again, this rule should be subject to the proviso that D1 should be able to claim contribution in a separate action, after he has been held liable to P, where the court before which P's action is instituted cannot in law award contribution.[70]

More difficult is the question whether a further exception should be made to cover cases where the contribution claimant could, as a matter of law, have served a third party notice and had the issue of contribution decided on its merits, but where it was impracticable for him to have done so. On balance, the Commission favours broadening the scope of the exception beyond cases where it is legally impossible to claim contribution within the main action. Admittedly, under the present law, there will be few situations in which it will be impractical for a defendant to institute a claim for contribution by way of a third party claim. He will normally be aware at some time before the conclusion of the plaintiff's action that another person may be concurrently liable for the plaintiff's loss. In cases where the defendant does not know the whereabouts of such a person, substitutional service is available.[71] Nonetheless, there is much to be said for enabling the defendant to claim contribution in an independent action in cases where proceeding by way of a third party claim is impracticable, especially since expanding the scope of the right of contribution may increase the incidence of situations where to deny the contribution claimant this remedy would effectively negate his substantive right.

The Commission recommends, therefore, that a person should be able to claim contribution in a separate proceeding, after being held liable to the plaintiff, provided that the person from whom contribution is claimed was not a party to the plaintiff's action in which the claimant was held liable and that it was impracticable for him to have pursued the claim by way of a third party notice.[72]

Finally, it should be noted that, under section 3 of the *Negligence Act*, a defendant who has settled with the injured person may claim contribution from another concurrent wrongdoer in an independent action.[73] Moreover, the bar upon claiming contribution in an independent action appears not to apply to a consent judgment against D1 in favour of P. Consent judgments are treated for this purpose as settlements, and give rise to a claim for

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[68] Draft Act, s. 19(3).

[69] *Ibid.*, s. 19(2).

[70] *Ibid.*, s. 19(3).

[71] See Rules of Civil Procedure, *supra*, note 1, r. 16.04. On service outside the jurisdiction, see R. 17.

[72] Draft Act, s. 19(3).

[73] See *supra*, this ch., sec. 2(a)(iv).

contribution under section 3 of the *Negligence Act*.[74] However, if D1 has been sued to judgment by P, D1 cannot later claim contribution from D2, a co-defendant, who settled P's claim in the course of the trial: this was the fact situation in *Cohen v. S. McCord & Co. Ltd.* itself.

The Commission recommends that, as is the case under the *Negligence Act*, a person whose right to contribution is based upon a settlement of the injured person's claim should continue to be entitled to institute an independent action for contribution against a person who is or may be concurrently liable for the loss to which the settlement relates. Moreover, for example, where P sues D1 and D2 (or D2 is added as a third party), D1 immediately institutes contribution proceedings against D2, and then D1 settles with P, D1 should be entitled, as he now is under the *Negligence Act*, to continue the proceedings for contribution against D2. It is further recommended that consent judgments should continue to be treated as if they were court-approved settlements for the purpose of making a claim for contribution, on the ground that it would be arbitrary to make the procedural consequences of a settlement depend upon the often fortuitous fact of whether or not its terms were embodied in a formal judgment.[75]

3. CONTRIBUTION CLAIMS AND LIMITATION PERIODS

(a) Introduction

The question considered in this part of the chapter is whether a special limitation period within which a claim for contribution must be made against a concurrent wrongdoer should be recommended, and, if it should, what its duration ought to be. It is important at the outset to emphasize the comparatively narrow scope of the issue under consideration and to distinguish it from other aspects of the expiry of limitation periods. In chapter 7 of this Report, the Commission examined the question whether D1's right to contribution should be prevented from arising by the fact that, when P instituted proceedings against or settled with D1, P's cause of action against D2 had become barred by the lapse of time. It will be recalled that the Commission concluded that it would be unjust to allow D1's ability to obtain contribution to be thwarted by P's failure to press his claim against D1 before D2's liability to P had ceased to be enforceable by virtue of the expiry of a limitation period.[76] It is also relevant to note that, under the recommendation made in the previous section of this chapter, when D1 is sued by P, he must normally claim contribution within or incidentally to the action, either by way of a crossclaim or a third party claim.

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[74] *Morello v. Henderson*, *supra*, note 39, and *Glass v. Avenue Dodge Chrysler*, *supra*, note 34.

[75] Draft Act, s. 17(1).

[76] See *supra*, ch. 7, sec. 2(c).

There would, therefore, be relatively few situations in which a question could arise about the limitation period governing the contribution claim itself. However, it will be important to know the period within which a right to contribution must be enforced when the claim for contribution is made following a settlement between the injured person and the claimant for contribution, and in those rare situations when a claim for contribution that is based upon a judgment given in favour of the injured person against the claimant for contribution can be asserted subsequently by way of an independent action.

(b) The Present Law

Neither the *Negligence Act* nor the *Limitations Act*[77] expressly specifies the period within which a claim for contribution must be made. The better view appears to be that an action for contribution must be brought within six years of the date when the cause of action accrued.[78] In *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*,[79] Viscount Simonds was prepared to assume that, for limitations purposes, the claim should be treated as one for breach of contract. The reasoning supporting this view is that contribution is the equitable equivalent of the common law action of *indebitatus assumpsit*, and is similar to the common law money count for money paid by a person to another's use.[80] Historically, the common law counts were classified as *quasi*-contractual.[81] If this is the correct characterization of contribution among wrongdoers, the relevant provision in the Ontario *Limitations Act* would be section 45(1)(g), which also prescribes a six year limitation period for actions for simple contracts or debts founded upon contract.

The matter cannot, however, be regarded as completely free from doubt. The propriety of regarding even the common law money counts as being "contractual" in any real sense is no longer accepted in Canada.[82] It is even more questionable to extend this dubious reasoning to a statutory right derived from an equitable principle, albeit one that can be brought under the same broad umbrella of restitution that also shelters the action for money paid. It might thus be suggested that the relevant provision in the *Limitations Act* is section 45(1)(h); this provides a limitation period of two years within which "*an action for* a penalty, damages, or *a sum of money given by any statute to*...the party aggrieved..." must be enforced. There is some

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[77] R.S.O. 1980, c. 240.

[78] See, for example, *Black v. Horseman* (1974), 4 O.R. (2d) 188 (H.C.J.), at 194.

[79] [1955] A.C. 169 (H.L.), at 177.

[80] For a recent judicial recognition of this similarity, see *Ronex Properties Ltd. v. John Laing Construction Ltd.*, [1983] Q.B. 398, at 407, [1982] 3 All E.R. 961 (C.A.).

[81] Goff and Jones, *The Law of Restitution* (2d ed., 1978), at 5-11.

[82] Fridman and McLeod, *Restitution* (1982), at 29-30.

weak authority to this effect.[83] It is hardly surprising that the question has rarely arisen in Ontario; the reason, of course, is that *Cohen v. S. McCord & Co. Ltd.* has ensured that most claims for contribution are made before the liability of D1 to P has been determined in litigation.

Section 9 is the one provision of the *Negligence Act* that has a direct bearing upon the time within which claims for contribution must be made. This, it will be recalled, has been held to enable a claim for contribution to be made against a concurrent tortfeasor who had ceased to be liable by the time the injured person commenced proceedings against or settled with D1.[84] However, the section restricts the claimant's right to contribution by providing that the claim must be made within a year of the judgment in P's favour against D1 or of the settlement between P and D1. In addition, there must have been compliance with any statutory requirement respecting the service of notice of P's claim against D2. These provisions give a very limited and somewhat arbitrary degree of protection to D2 from claims for contribution made long after his liability to P has expired.

An important aspect of the description of any limitation period is the point in time from which it starts to run. Although there are some aberrant decisions,[85] the clear weight of authority supports the proposition that the right to contribution arises at the date of the judgment in P's favour against D1 or, where D1's claim is based upon a settlement, the date when the settlement was made.[86] A claim for contribution, even when made by way of a third party claim within the main action, has been recognized in other contexts as having an existence that is independent of P's cause of action.[87] The limitation period governing the contribution claim will, therefore, start to run from the event giving rise to the right to contribution in a given case; it does *not* commence when the injured person's cause of action accrued against the wrongdoer who is seeking contribution.

The reason why the limitation period governing D1's right to contribution commences at one of the two points indicated above is that the right is based upon the conferral upon D2 by D1 of a benefit that takes the form of

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[83] *Sherritt v. Thorold Concrete Block Co.*, [1954] O.W.N. 535 (C.A.), and *Schwella v. The Queen*, [1957] Ex. C.R. 226.

[84] See *supra*, ch. 7, sec. 2(a). Section 9 is reproduced *supra*, note 42.

[85] See, for example, *Glass v. Avenue Dodge Chrysler*, *supra*, note 34.

[86] Cheifetz, *supra*, note 6, at 76-77. See, also, *Cristovao v. Doran's Beverages Inc.*, *supra*, note 50.

[87] *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, *supra*, note 48. See, however, *Dorland v. Apollo Leasing Ltd.* (1981), 33 O.R. (2d) 183 (Div. Ct.), where a third party claim by the defendant against a municipality was held to deny the plaintiff a right to a trial by jury of the main action. The municipality would be bound at least by the assessment of damages in the plaintiff's action, and the *Judicature Act*, R.S.O. 1980, c. 223, s. 58 (repealed by the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 187(1)) provides that certain actions against municipalities shall be tried without a jury (see, now, *Courts of Justice Act, 1984*, s. 121(2)12).

discharging or reducing D2's liability to P. Nonetheless, there are objections to pursuing this reasoning to its logical conclusion in the context of periods of limitation, because, particularly where the limitation period is a lengthy one, the effect may be to extend unduly the length of time for which D2 remains liable to a claim that will depend, in part at least, upon events for which he may have ceased to be liable some considerable time previously.

Suppose, for example, that P has suffered a single loss as a result of breaches of separate contracts by D1 and D2. P has six years from the breach within which to press his claim against them. One day before the period expires, D1 settles P's claim in full. If D1's right to seek contribution from D2 is regarded as a truly independent cause of action springing from his settlement with P, then D1 may arguably delay a further six years less one day before commencing proceedings for contribution. It may seem at least questionable whether D2 should remain potentially liable for almost twelve years from the time that P's cause of action against him for an alleged breach of contract arose. The problem is aggravated, of course, if D2's liability to P had expired before D1 settled with P or before P obtained a judgment against him.

(c) Alternatives for Reform

Several approaches to reform are possible in respect of the limitation period governing contribution claims. One alternative is to recommend that any statutory reform of the law relating to contribution among concurrent wrongdoers should not contain any provisions dealing with the time within which D1 must claim contribution. Despite the uncertainty in the present law about the limitation period applicable to claims of this kind, and the potential for causing an injustice to D2, who must remain ready to defend a claim long after he has ceased to be liable to P, it could be argued that this is a problem that ought to be left to be considered within the context of a general reform of limitation periods. Moreover, there is little evidence to suggest that the theoretical disadvantages of the present law are any more than exactly that: in practice, neither injured plaintiffs nor claimants for contribution generally delay the institution of the legal proceedings necessary to assert their rights.

Against this position it can be argued that, given the uncertain nature of the present law on a point of particular relevance to contribution among wrongdoers, it is appropriate that it should at least be clarified by legislation. Reform of the law of limitations in Ontario has been under consideration for some time, and there is no reason why the aspect relevant to this Report should not be settled now.[88]

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[88] Neither the Ontario Law Reform Commission's *Report on Limitation of Actions* (1969), nor the draft *Limitations Act* proposed in *Discussion Paper on the Proposed Limitations Act* (1977), issued by the Ministry of the Attorney General, nor the former proposed *Limitations Act, 1983*, Bill 160, 1983 (3d Sess. 32d Legis.), which did not proceed beyond 1st Reading, deals specifically with this issue. Claims for contribution would generally

If it is desirable to include in the proposed statute a limitation period specifically governing claims for contribution among wrongdoers, a second approach would be to adopt a single length of time that would apply to all such claims. While the selection of a limitation period is always somewhat arbitrary, to establish a uniform limitation period would have the great merits of clarity and simplicity.

As indicated, the present law probably provides that, except for claims for contribution governed by section 9 of the *Negligence Act*, D1 has six years from the date either that judgment was entered against him, or that he settled with P, in which to institute proceedings for contribution. This seems unduly long, especially when it is recalled that the claim could involve disputed events that happened nearly twelve years before contribution is claimed, and that D2 may have ceased some time before to be capable of being sued successfully by P.

The English *Civil Liability (Contribution) Act 1978*[89] extends to the expanded right of contribution among all concurrent civil wrongdoers the two year limitation period that formerly governed claims for contribution and indemnity among concurrent tortfeasors.[90] The Law Reform Commission of Hong Kong has recommended the adoption of the English solution.[91] The American Uniform Comparative Fault Act also contains a single limitation period of one year within which the right to contribution must be asserted.[92]

A third possible approach is to relate the limitation period governing the contribution claim to the period within which D2 remains liable to P. The advantages of a scheme of this kind are twofold. First, it protects D2 from claims for contribution brought too long after his original liability to P has expired. Secondly, it ensures that D1 will be able to sue D2 for at least as long as D2 could be sued successfully by P. In short, this type of proposal recognizes that, although the right to contribution is in some respects

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be governed by the residual six year limitation period, although it was recommended that a provision similar to s. 9 of the *Negligence Act* should be included in any new limitations statute. See Ontario Law Reform Commission Report, at 111-13, and Discussion Paper, draft *Limitations Act*, s. 4(2). See, also, Bill 160, ss. 5(3) and 21(2)14.

[89] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.).

[90] See Schedule 1 of the 1978 Act, which made the necessary amendments to the *Limitation Act 1963*, c. 47 (U.K.), s. 4, in order to make it applicable to all concurrent wrongdoers with a right of contribution under the 1978 Act. (See *Limitation Act 1980*, c. 58 (U.K.), s. 40(3), Sch. 4, which repealed s. 4 of the *Limitation Act 1963*. See, now, s. 10 of the 1980 Act.) In its *Twenty-First Report (Final Report on Limitation of Actions)* (Cmnd. 6923, 1977), para. 3.34, at 40, the English Law Reform Committee concluded that it was unlikely in practice that D2 would be required to pay contribution long after his liability to P had ceased to be enforceable, and that it was therefore unnecessary to shorten the limitation period to deal with the problem.

[91] The Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers*, Topic 5 (1984), at 28-30.

[92] *Supra*, note 60, §5(c).

independent of the right of the injured person, there is, nonetheless, a substantial overlap between the factual and legal bases of D2's liability to both P and D1.

Considerations of this kind have influenced law reform in some jurisdictions. For example, section 31 of the Irish *Civil Liability Act, 1961*[93] provides that D1 must pursue his right to contribution within two years from the time of judgment or the time that P's damages are paid, or for as long as D2's liability to P remains enforceable, whichever period is the longer. Other proposals have fixed the continuing liability of D2 to P as the maximum extent of the limitation period. For example, the Alberta Institute of Law Research and Reform has recommended that D1 should not be entitled to bring a separate action for contribution after the expiry of the limitation period governing P's rights against D2.[94] The South African *Apportionment of Damages Act, 1956*[95] provides that, in order to claim contribution, D1 must establish that he has brought his action within one year from the date that judgment was entered against him in his litigation with P, *and* that P's right to sue D2 has not become barred by the expiry of the limitation period governing the enforcement of P's claim against D2. As we have already seen, section 9 of Ontario's present *Negligence Act* imposes a short limitation period for the enforcement of the right of contribution against contributors whose liability to the injured person has already lapsed.

(d) Conclusions

A number of competing considerations are relevant to determining the appropriate limitation period. On the one hand, sufficient time should be given to enable D1 to vindicate effectively his right to contribution. However, in the interests of the administration of justice and fairness to the person from whom contribution is claimed, the claimant's right should be asserted without undue delay.

In striking the appropriate balance, two considerations peculiar to the right of contribution among wrongdoers should be borne carefully in mind. First, while the right arises at the date of the judgment against D1 or the time when D1 settles with P, many of the issues relevant to establishing the right and to any defence that D2 may raise will relate to the earlier events surrounding the infliction of the loss upon P by the concurrent wrongs of D1 and D2. The argument for shortening the limitation period is strengthened if D2's liability to P has become statute-barred.

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[93] *Supra* note 22.

[94] Alberta Report, *supra*, note 63, at 75-76. However, the Report also recommended (at 71) that the lapse of the limitation period governing P's rights against D2 should not prevent D1 from claiming contribution in a third party proceeding, provided that notice is served within 6 months of the delivery to D1 of P's statement of claim.

[95] *Supra*, note 59, s. 2(6)(b).

Secondly, the Commission has already emphasized the undesirability of permitting D1, after being held liable to P, to claim contribution in a separate proceeding. To impose a short limitation period upon the right to contribution would minimize the situations in which such a claim could ever be made successfully. On the other hand, once it has been decided that justice requires that some limited exceptions should be made to a statutory codification of the rule in *Cohen v. S. McCord & Co. Ltd.*, D1 should not be denied, by the imposition of an unrealistically short limitation period, a fair opportunity to avail himself of the benefit of the exception that permits him to proceed by way of a separate action. In addition, the mischief at which the rule in *Cohen v. S. McCord & Co. Ltd.* is aimed is, of course, not present when D1 claims contribution following a settlement; however, most of the reasons considered above for a short limitation period for contribution claims remain relevant in this context.

An undoubted advantage of a uniform limitation period governing all claims for contribution from a concurrent wrongdoer is that it would make for clarity in the law and ease of administration. It is likely that the cases in which a genuine limitation issue will arise will be few because most claims will continue to be made within or incidentally to the main action, and those made in an independent action will generally be asserted expeditiously. The circumstances in which contribution will be sought in an independent action from a person who has ceased to be liable to the injured person will be unusual.

In recommending that a right to contribution should not be prevented from arising by the expiry of the limitation period governing P's rights against D2, the Commission has already indicated that it does not regard this as a decisive matter in determining the availability of the right.[96] We further recommend here that a single limitation period should govern all actions for contribution among wrongdoers brought after D1 has been held liable to P or D1 and P have made a settlement. In the opinion of the Commission, a person should be required to institute proceedings for contribution within two years of the date of the judgment or settlement that gave rise to the right.[97]

The imposition of a comparatively short limitation period is justified by the close relationship between the claim for contribution and earlier events, the possible lapse of the time within which P had to enforce his rights against D2, and the public policy interest in keeping to a minimum the incidence of multiple litigation.

4. ENFORCING THE RIGHT TO CONTRIBUTION

Throughout this Report, we have argued that an important rationalizing principle of the right to contribution among wrongdoers is that, by

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[96] See *supra*, ch. 7, sec. 2(c).

[97] Draft Act, s. 18.

discharging his liability to P, D1 thereby confers a benefit upon D2, who is concurrently liable for P's loss, and that D2 will be unjustly enriched at D1's expense if D1 pays to P more than the share of the total liability that, as between D1 and D2, should fairly be borne by D1. One of the peculiarities of contribution claims is that proceedings may be instituted, and an order for contribution obtained from the court, before D1 has been held liable to P or has made a payment that discharges or reduces the concurrent liability of D1 and D2.

As we have seen, the most common procedural method of claiming contribution is the crossclaim or third party claim made within the action brought against D1 and D2, or D1 alone. Claims for contribution are thus typically made before the essential ingredients of the right are present; moreover, at the conclusion of the trial, the judgment may order D2 to pay contribution to D1, even though D1 has not yet paid anything to the successful plaintiff, and therefore has conferred no benefit at all upon D2. Similarly, proceedings may be instituted under section 3 of the *Negligence Act* even before a settlement has been made between P and D1.[98] An English court has held that contribution could be claimed in an action as soon as D1 could show that a demand from P was imminent.[99]

While the courts may fairly readily allow a claim for contribution to be made before D1 has paid anything to P or before a settlement has been made between P and D1, provided that D1 can prove an imminent loss, it does not follow that an order made in D1's favour will be immediately executable. The principal issue considered in this part of the chapter touches primarily upon this latter question, namely, the determination of the earliest moment at which the contribution claimant is entitled to an executable order for contribution.[100] Should D1 be required to satisfy P's claim in full, or only to pay his proportionate share, before being entitled to be put in funds by D2? It might even be argued that as soon as D1 pays anything at all he should have an enforceable right immediately to recover part by way of contribution, on the ground that every dollar that he pays to P reduces D2's liability and thus confers a benefit upon him. On the other hand, it could be pointed out that the purpose of a contribution order is to prevent unjust enrichment, and that D2 is only *unjustly* enriched when D1 pays more than his proportionate share of the loss. Moreover, it may be unjust to D2 to allow the contribution order to be executed before D1 has satisfied the judgment in full, because D2 may remain liable to P for the unsatisfied portion.

Consider, first, the case where D1 and D2 are both sued by P in one proceeding. Assume that both are held liable to P and are found to be equally responsible for the loss. The order normally made in such a case is that each party is entitled to claim contribution on paying to P more than 50

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[98] See, for example, *Glass v. Avenue Dodge Chrysler*, *supra*, note 34.

[99] *Wolmershausen v. Gullick*, [1893] 2 Ch. D. 514.

[100] See Cheifetz, *supra*, note 6, at 122-26.

percent of P's recoverable loss.[101] A problem arises if it is suspected that D2 cannot satisfy P's judgment and that it will not be possible to enforce it. To require D1 to satisfy the judgment in full before being able to execute the contribution order might be unduly harsh: D1 might be able to satisfy his proportionate share without too much difficulty, but would be financially embarrassed if he had to pay the entire amount before recovering anything from D2. On the other hand, to allow D1 to obtain payment from D2 before he has compensated P in full may endanger P's ability to recover the balance from D2. P and D1 may thus be competing for D2's limited resources. Of course, P can always elect to execute against D1 for the entire amount.

The solution to this problem adopted in section 23 of the Irish *Civil Liability Act, 1961*[102] is that D1 may execute the contribution order either when he has discharged his entire liability to P or when he has paid more than his proportionate share. However, if D1 has not paid the entire amount, he is only entitled to contribution in respect of the amount paid in excess of the proportion of the judgment that he should ultimately bear. Moreover, when D1 seeks to enforce the contribution order before paying the entire loss, the court must make provision, "by obtaining the personal undertaking of [D1's] solicitor or otherwise, for applying the sum received under the said judgment towards satisfaction of the damages due to the injured person".

A similar recommendation has been made by the Alberta Institute of Law Research and Reform, which has proposed that, where execution of the contribution judgment is issued after D1 has paid more than his proportionate share, but less than the total amount, the money recovered from D2 should be paid into court to the credit of the person who has suffered the damage or such other person as the judge may order.[103] This recommendation has been incorporated in section 14 of the Canadian *Uniform Contributory Fault Act*.[104]

Suppose, though, that D2 has not been joined as a co-defendant to P's action against D1, but has been brought in by D1 as a third party. Should similar principles apply to the execution of a judgment for contribution obtained by D1 against D2? It has been suggested that, in this case, D1 should be able to execute the contribution order for every dollar that he pays, even if his payment to P never exceeds the proportion of the liability that, as between himself and D2, he ought ultimately to bear.[105] Again, provision could be made for ensuring that whatever is recovered from D2 goes first to satisfy any amount of P's judgment against D1 that D1 has not satisfied. The

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[101] For an example of the typical form of the order, see *Stewart v. London Transportation Comm.*, [1969] 1 O.R. 123, 1 D.L.R. (3d) 550 (H.C.J.).

[102] *Supra*, note 22.

[103] Alberta Report, *supra*, note 63, at 81-83.

[104] *Supra*, note 65.

[105] Cheifetz, *supra*, note 6, at 123-25. See, also, Williams, *supra*, note 22, at 148-51.

argument made is that, since P has not obtained judgment against D2, to enable D1 to claim contribution before paying his fair share would not put P and D1 in the position of competitors for D2's money. Moreover, if any money recovered by D1 is applied first to satisfying P's claim, then P will actually be able to recover more through this means than he would if the contribution order was only enforced in respect of any amount actually paid by D1 in excess of his proportionate share.

It is not recommended that the preceding proposal be adopted. It may be noted that the Canadian *Uniform Contributory Fault Act* does not distinguish between a case where D2 is a co-defendant and where he is a third party. To introduce an added complexity in the procedural arrangements needs clear justification. It is not obvious why D2, who has not, after all, been sued by P, should be required indirectly to put P in funds when D2 has not been unjustly enriched, because D1 has paid less than D1's proportionate share of P's loss. If D1 is solvent, P can recover in full against him, and if he is not, it is not clear why P should have access to the funds of D2, whom he has not made a party to the main action.

The Commission has recommended earlier in this Report that, as a general principle, a person should be able to obtain contribution from a concurrent wrongdoer, even though that person's liability to P has not been judicially determined. Thus, D1 may claim contribution when he has settled P's claim, either in total satisfaction of any cause of action that P may have against anyone in respect of the loss, or in satisfaction only of P's claim against D1.[106] If D1 has settled with P in such a way as to render D2 immune from an action by P, then D1 will be able to obtain an executable order for contribution when he has paid his proportionate share of P's loss as quantified by the settlement figure, assuming, of course, that it is not unreasonable.

The issues are more complex when D1 has settled only his own share of P's claim, so that P is still able to sue D2 for the balance. It will be difficult for D1 to know whether he is entitled to contribution before P's loss has been fixed if D1 must show that he has paid more than his fair share. It may also be unfair to require D2 to pay anything to D1 while he remains liable to P.

One solution would be to deny D1 the right to an executable order for contribution while P may still successfully sue D2 for the balance of his loss. When P's claim against D2 lapses through the expiry of the limitation period, or is satisfied, D1 could then recover from D2 if he had settled for more than his fair share. The difficulty with this solution is that it may keep D1 out of funds for an unduly long period; it may also prevent him from recovering at all if D2's financial position is precarious or if he moves assets out of the jurisdiction. Another disadvantage is that it may discourage the making of partial settlements.

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[106] See *supra*, ch. 5, sec. 3(c).

Alternatively, the rule applied to other bases for contribution claims could be extended to partial settlements—that is, D1 will be entitled to an executable order when he has paid more than his due proportion of the liability. In order to protect D2 from being sued twice, and to ensure that P and D1 are not in competition for the same assets, the court could order that any moneys found payable by D2 as contribution should be used first to ensure that P is fully compensated for his loss. While the Irish Act does not deal with this aspect of contribution claims made on the basis of a settlement, the provision in the Canadian *Uniform Contributory Fault Act* appears general enough to cover the problem. The court might order, for example, that the claimant's solicitor shall hold moneys paid by D2 in trust for P until P had been fully compensated.

Following the enactment of the English *Civil Liability (Contribution) Act 1978*,[107] an amendment was made to the rules of practice to deal with the execution of contribution orders against concurrent wrongdoers. The Rules of the Supreme Court now provide[108] that when a contribution order is made against a third party, a co-defendant, or a defendant in an action commenced to obtain an order for contribution, execution shall not issue on the order without the leave of the court until the contribution claimant has discharged his liability to the injured person. Although the Rules do not set out when leave will be granted, or on what terms, it will presumably be open to the court to ensure that the injured person will be satisfied first out of any money that the contributor is ordered to pay. Leave may be refused if the contributor remains at risk of an action by the injured person.

The Commission has come to the conclusion and, accordingly, recommends that a contribution order should not be executed until the contribution claimant has paid more than his proportionate share of the common liability, unless the contributor has ceased to be liable to the injured person. When the claimant has not discharged his liability to the injured person, the money recovered from the contributor should be paid into court in satisfaction of the claimant's liability to the injured person.[109]

Recommendations

1. A person who is claiming contribution from another who is a co-defendant in the action brought by the injured person should do so by a crossclaim in that action, in accordance with the relevant provisions of the Rules of Civil Procedure, unless the court before which the action is brought has no jurisdiction to determine the claim for contribution.

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[107] *Supra*, note 89.

[108] R.S.C. 1965, O. 16, r. 7(2) and (3).

[109] Draft Act, s. 13.

2. A person who is sued by the injured person should normally claim contribution from a concurrent wrongdoer, who is not a party defendant, by a third party claim in accordance with the relevant provisions of the Rules of Civil Procedure. However, the claimant should be entitled to institute an independent action for contribution where the court before which the injured person's action was brought had no jurisdiction to determine the claim for contribution, or it was otherwise impracticable for the claimant to assert his right to contribution by a third party claim.

3. A person whose right to contribution is based upon a settlement of the injured person's claim should be entitled to institute or continue proceedings for contribution against a person who is or may be concurrently liable for the loss to which the settlement relates. For this purpose, "settlement" should include a settlement approved by a court and a judgment obtained by consent.

4. The limitation period governing the enforcement of the right of contribution among concurrent wrongdoers should be two years. Where the claim is based upon a judgment against the claimant in favour of the injured party, the period should run from the date of the judgment. Where the claim is based upon a settlement, the period should commence from the date when the settlement was made.

5. An order for the payment of contribution should become executable when the claimant has discharged a greater proportion of the common liability than represents his degree of fault, or when the contributor can no longer be sued successfully by the injured person. Where the claimant has not discharged his liability to the injured person, the money recovered from the contributor should be paid into court in satisfaction of the claimant's liability to the injured person.

CHAPTER 10

CONTRIBUTORY NEGLIGENCE

1. INTRODUCTION

Contributory negligence means a failure to exercise reasonable care for one's own person, property, or other recognized interest. This chapter considers the question whether, where such conduct is one of the causes of a plaintiff's harm, the court should be able to apportion responsibility between the plaintiff and defendant and to reduce the plaintiff's recovery accordingly.

(a) THE COMMON LAW BACKGROUND

At common law, contributory negligence was, in theory, a complete defence.[1] The result of this rule was very harsh to the plaintiff, who could be deprived of all compensation on account of a comparatively slight act of carelessness. Even though the defendant was, comparatively speaking, far more to blame than the plaintiff, the latter would recover nothing. There seems to be no adequate theoretical justification for this rule, especially as, from an early date, the civil law applied a different rule in the High Court of Admiralty.[2]

Even the common law recognized that the effect of the rule was too harsh, for, at an early date, there developed a subsidiary rule called the doctrine of "last clear chance", or "last opportunity", or "ultimate negligence", whereby the defendant was made liable, despite the plaintiff's contributory negligence, if the defendant could have avoided the accident altogether by the use of due care at the time of its occurrence.

The last clear chance rule often enabled the courts to secure a verdict for a contributorily negligent plaintiff, and to that extent it served a useful purpose in alleviating the unduly harsh rule of contributory negligence. But

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[1] *Butterfield v. Forrester* (1809), 11 East 60, 103 E.R. 926 (K.B.).

[2] *Hay v. LeNeve* (1824), 2 Shaw, Sc. App. 395 (H.L.). In *Cayzer, Irvine & Co. v. Carron Co.* (1884), 9 App. Cas. 873 (H.L.), at 881, Lord Blackburn stated that there was authority before 1824 for apportionment according to the degree of fault.

the doctrine of last clear chance rested on uncertain logical foundations, and consequently acquired complexities, anomalies, and uncertainties of its own[3]—a common result where the courts, unhappy with the consequences of a legal rule, seize on an illogical means of avoiding those consequences. The motives of the judges who developed such an exception can be understood and even applauded, but the law became complex and logically indefensible. The real cause of the difficulty was the original rule, and the only satisfactory solution was abrogation of that rule, an event that occurred in all Canadian common law jurisdictions by legislation.

(b) Apportionment Legislation

In 1924, Ontario became the first jurisdiction in the common law world to introduce apportionment legislation.[4] The United Kingdom followed suit in 1945.[5] The relevant sections in the Ontario legislation, the *Negligence Act*,[6] now provide as follows:

> 4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.
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> 5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

The provisions of the *Uniform Contributory Fault Act*, adopted by the Uniform Law Conference of Canada in 1984,[7] that correspond to sections 4 and 5 of the Ontario *Negligence Act* are as follows:

> 5.—(1) Where the fault of two or more persons contributes to damage suffered by one or more of them, the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage.
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> . . . .
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> (3) If the degrees to which the fault of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

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[3] See Fleming, *The Law of Torts* (6th ed., 1983), at 243-44.

[4] *The Contributory Negligence Act, 1924*, S.O. 1924, c. 32.

[5] *Law Reform (Contributory Negligence) Act, 1945*, c. 28 (U.K.).

[6] *Negligence Act*, R.S.O. 1980, c. 315.

[7] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act*.

The Act was based on a Report of the Alberta Institute of Law Research and Reform. See Alberta, Institute of Law Research and Reform, *Contributory Negligence*

The wording of section 5(1) of the *Uniform Contributory Fault Act* follows the wording of the former Uniform Act, first adopted in 1924 and revised in 1935 and 1953.[8] Section 6 of the 1984 Act makes it clear that each wrongdoer is liable *in solidum* for the whole of the plaintiff's loss not attributable to the plaintiff's own contributory negligence.

The balance of this chapter considers the questions whether apportionment legislation should be retained and, if so, the form it should take and its proper scope.

The more general question—whether apportionment for contributory negligence should be retained—may be disposed of very briefly. Every Commonwealth common law jurisdiction has apportionment legislation. American jurisdictions, after much hesitation, are now adopting a similar approach, either by legislation or by judicial decision.[9] We believe that a return to the common law position would be intolerably harsh. On the other hand, a rule that the plaintiff should always recover in full would be perceived as unfair to the defendant, perhaps leading the court to deny liability altogether on principles of causation or assumption of risk.[10] So long as the present system of individual responsibility remains, it would seem that apportionment legislation should be retained.[11] Accordingly, we recommend that, subject to the recommendations made in the balance of

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and Concurrent Wrongdoers, Report No. 31 (1979) (hereinafter referred to as "Alberta Report"). See, also, the Institute's Working Paper: *Contributory Negligence and Concurrent Tortfeasors* (1975).

[8] See *Proceedings of the Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1924), Appendix B; *Proceedings of the Eighteenth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1935), Appendix E; and *Proceedings of the Thirty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1953), Appendix I.

It should be noted that the former Uniform Act remains in force in Alberta. See the Alberta *Contributory Negligence Act*, R.S.A. 1980, c. C-23. Section 1(1) of the Alberta Act reads:

> 1.—(1) When by fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault....

[9] See Wade, "Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana" (1980), 40 La. L. Rev. 299.

[10] Moreover, such a rule would be inconsistent with this Commission's *Report on Products Liability* (1979).

[11] However, the wording of the Ontario *Negligence Act*, *supra*, note 6, seems to be unsatisfactory in several respects. For example, the use of the word "damages" in the phrase "that contributed to the damages" is not consistent with conventional use, and the requirement of apportionment against "parties" may leave open the possibility that a court might, in the case of two or more wrongdoers each partly responsible for the loss, only one of whom was a party to the plaintiff's action, find that damages should be apportioned up to 100% between the plaintiff and the wrongdoer who was made a party. With respect to the latter issue, see discussion *infra*, this ch., sec. 5(a).

this chapter, where a person is injured by the wrongful act of one or more persons and the fault of the injured person is found to have contributed to the damage, the court should determine the degrees of fault of the person or persons and of the injured person that contributed to the damage, and should apportion the damages in proportion to the degrees of fault that are so found.[12]

The question concerning the relative degrees of fault of the wrongdoer and the injured person is, as we shall see,[13] one of fact, to be determined having regard to all the circumstances of the case. In some situations, it may be extremely difficult to make an assessment of the plaintiff's degree of fault in relation to that of the defendant. Where this difficulty arises, there may well be a tendency to view the plaintiff's degree of fault in isolation, rather than comparatively, and to set the plaintiff's degree of fault at a conventional figure or a conventional range.

For example, it has been suggested that, given the problems of proof where the plaintiff's injuries are allegedly exacerbated by a failure to wear a seat belt, courts not infrequently set the degree of fault of the plaintiff at between ten and thirty percent. It is sometimes said that the figure is arrived at not by a careful consideration of all the facts, but simply by the imposition of a conventional figure.[14]

The Commission is of the view that the establishment and use of a conventional figure respecting the plaintiff's relative degree of fault, whether in the seat belt cases or otherwise, is simply not warranted under the present *Negligence Act*. Nor do we believe that any justification for the imposition of a conventional figure could or should exist under the provision we have just recommended for inclusion in the proposed *Contribution and Comparative Fault Act*. The court's mandate is clearly and unequivocally to determine the issue on a comparative basis, having regard to the relative degrees of fault of both parties in each particular case.

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[12] See the Commission's proposed *Contribution and Comparative Fault Act* (hereinafter referred to as "Draft Act"), s. 2(1). The Draft Act appears as an Appendix of this Report.

[13] *Infra*, this ch., sec. 8.

[14] See, for example, *Froom v. Butcher*, [1975] 3 All E.R. 520 (C.A.), at 527-28. This tendency appears to be most noticeable in British Columbia. See, for example, *Yuan v. Farstad* (1967), 66 D.L.R. (2d) 295, 62 W.W.R. 645 (B.C.S.C.), and *Thorsell v. Hoem* (1984), 54 B.C.L.R. 35 (S.C.). But see *Halliday v. Sanrud* (1979), 15 B.C.L.R. 4 (C.A.), esp. at 10. For a review of British Columbia case law, see Thornicroft, "Contributory Negligence and the Seat Belt Law" (1984), 42 The Advocate 29. Thornicroft agrees that the degree of fault is a question of fact, but suggests the use of a conventional figure. Linden endorses this suggestion, in order to ameliorate the problems of proof, but would countenance the introduction of evidence to show that the conventional figure is not appropriate in the particular case: Linden, "Torts—Seat Belts and Contributory Negligence" (1971), 49 Can. B. Rev. 475, at 481.

The following are examples of cases in which Ontario courts considered whether the plaintiff's failure to wear a seat belt constituted contributory negligence and, if so, to what degree: *Van Spronsen v. Gawor*, [1971] 2 O.R. 729, 19 D.L.R. (3d) 53 (Co. Ct.) (no

2. LEGAL WRONGS SUBJECT TO APPORTIONMENT

(a) Introduction

The proper scope of the apportionment legislation has proved to be a most difficult question, both as a matter of construction of the current legislation and as a question of principle. The Uniform Act provides:

> 1. In this Act,
>
> ....
>
> 'fault' means an act or omission that constitutes
>
> (a) a tort,
>
> (b) a breach of a statutory duty that creates a liability for damages,
>
> (c) a breach of duty of care arising from a contract that creates a liability for damages, or
>
> (d) a failure of a person to take reasonable care of his own person, property or economic interest,
>
> whether or not it is intentional.

The various areas of difficulty will be considered below from the points of view of the existing law in Ontario, the changes proposed by the Uniform Act, and the desirability of adopting those changes.

(b) Torts

(i) Nominate Torts Involving Negligence

The present Ontario legislation—section 4 of the *Negligence Act*—speaks of an action founded on "fault or negligence". This wording includes a negligent trespass and, probably, a negligent nuisance.[15] There seems to be no sound reason to exclude apportionment in such cases, and good reason to avoid attaching important consequences to the name chosen by the plaintiff for her action. The Uniform Act, by its definition of "fault",

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reduction in damages); *Jackson v. Millar*, [1972] 2 O.R. 197, 25 D.L.R. (3d) 161 (H.C.J.), rev'd on other grounds [1973] 1 O.R. 399, 31 D.L.R. (3d) 263 (C.A.), trial judgment restored [1976] 1 S.C.R. 225, 59 D.L.R. (3d) 246 (damages reduced 10%); *Dodgson v. Topolinsky* (1980), 33 O.R. (2d) 585, 125 D.L.R. (3d) 177 (H.C.J.) (subsequent reference is to 33 O.R. (2d)), aff'd (1980), 125 D.L.R. (3d) 177*n* (C.A.) (damages reduced 15%); and *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. H.C.J.) (damages reduced 30%). In the *Dodgson* case, Labrosse J. noted (at 586-88) the wide variation of the degree of contributory negligence attributed to a plaintiff by Ontario and other courts in the seat belt cases.

[15] *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 31 O.R. (2d) 571, 119 D.L.R. (3d) 254 (C.A.), and *Funnell v. C.P.R.*, [1964] 2 O.R. 325, 45 D.L.R. (2d) 481 (H.C.J.).

includes all torts, whether or not intentional, and therefore would extend the power of apportionment to cases of negligent trespass and nuisance. The Uniform Act would also, it seems, include cases of defamation. This extension seems to be desirable. Accordingly, we recommend that all torts committed by negligence should be included in the proposed contributory negligence apportionment legislation.[16]

(ii) Torts of Strict Liability

The plaintiff's negligence has always been regarded as a defence to torts of strict liability.[17] It has sometimes been argued that contributory negligence is an inappropriate concept where liability is strict because it is impossible to compare the plaintiff's negligence with the defendant's strict liability.[18] In our opinion, however, even where the defendant's liability is not based on negligence, the plaintiff may, by unreasonable conduct, contribute to her own loss, and in such a case apportionment seems to be the most appropriate solution. This was the view taken by the Commission in its 1979 *Report on Products Liability*.[19] Moreover, the principle of apportionment in cases of strict liability has been incorporated in recent Ontario legislation.[20] The Uniform Act, by its definition of "fault" in section 1, includes torts of strict liability, and we recommend that such torts should be included in our proposed Ontario apportionment legislation.[21]

(iii) Intentional Torts

Some difficulties and differences of opinion have arisen in respect of intentional torts. While there seems to be good reason to apply apportionment legislation in some cases of unintended injury—such as in the case of unintended trespass, discussed below—greater difficulty arises where the injury is intentional. Professor Williams supports the view that contributory negligence should not apply to intentional wrongdoing:[22]

> 'The intention to injure the plaintiff negatives all excuses'.... This exclusion of the defence in cases of intentional wrongdoing rests partly on ideas of policy; it is a penal provision aimed at repressing conduct flagrantly wrongful. Also, it is a

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[16] Draft Act, s. 2(2)(a).

[17] *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265, at 279, aff'd (1868), L.R. 3 H.L. 330, 37 L.J. Ex. 161.

[18] See American Law Institute, *Restatement of the Law, Second - Torts 2d* (1965), §402A, Comment n; *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P. 2d 1162 (Sup. Ct. 1978); and the discussion in Epstein, *Modern Products Liability Law* (1980), at 121-41.

[19] *Supra*, note 10, at 96-97.

[20] *Dog Owners' Liability Act*, R.S.O. 1980, c. 124, s. 2(3).

[21] Draft Act, s. 2(2)(a).

[22] Williams, *Joint Torts and Contributory Negligence* (1951), at 198, and *Horkin v. North Melbourne Football Club Social Club*, [1983] V.R. 153 (S.C.).

result of the ordinary human feeling that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether.

We now turn to consider whether apportionment should be available in respect of a number of intentional torts.

a. Assault and Battery

It may be argued that a distinction may be drawn between the case where the defendant actually intends to inflict the harm suffered by the plaintiff, and the case where the defendant intends an assault, but causes unanticipated harm, for example, because the plaintiff was not, as expected, wearing safety equipment.

In the latter case, there seems to be no objection in principle to apportionment. The loss can be said to be caused partly by the defendant's wrong and partly by the plaintiff's own fault. If the defendant's conduct is worthy of punishment, this object can be effected by the criminal law or by an award of exemplary damages. From the point of view of punishment, the extent of the plaintiff's loss is an irrelevant criterion. Often the defendant will be deserving of greater punishment than the law of compensatory damages can inflict. On the other hand, holding the defendant fully liable might, in the case of a trivial assault where no harm was intended, result in an excessive award.

In the case where the defendant actually intends the resulting harm, apportionment may seem less apt. Suppose that the defendant, intending to injure the plaintiff, waits until the plaintiff (contrary to proper practice) removes her hard hat, and then drops a brick onto her head. Here it is arguable that, as a matter of policy, the defendant ought to be fully liable for the resulting injury. It may be said, again, that considerations of punishment should be excluded for the reasons given in the preceding paragraph. Nevertheless, it is difficult to attribute any significant element of cause to the plaintiff's conduct. Admittedly, the wearing of a hard hat would have prevented this particular injury on this particular occasion, but if the defendant were determined to injure the plaintiff, she could presumably have found an opportunity to do so even if the plaintiff had complied with proper safety practice. In Professor Williams' opinion, the defendant's wrongful intention should outweigh the plaintiff's wrongful negligence.[23]

Even if one were to accept this view, however, it does not necessarily mean that intentional injury should be expressly excluded from the apportionment legislation. It is impossible for legislation to foresee all cases that will arise. Much must be left to the courts in any event. Drafting such an exclusion for cases where injury was intended would be a complex exercise and might create its own anomalies. In a case where the harm suffered was

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[23] *Supra*, note 22, at 198.

intended, it can be expected under the Uniform Act that, although apportionment is theoretically available, the trier of fact would be very unlikely to reduce the damages by a significant amount.

A difference of judicial and academic opinion has arisen in the case of provocation by the plaintiff that leads to an assault by the defendant. It is universally agreed that provocation may properly reduce an award of exemplary damages, for it is plainly relevant in assessing to what extent the defendant's conduct is worthy of punishment.[24] Similarly, provocation is relevant to the assessment of aggravated damages, for one who provokes an assault can less reasonably complain of insult or humiliation.[25]

The problem arises in respect of compensatory damages. In *Lane v. Holloway*,[26] the English Court of Appeal held that provocation could never reduce compensatory damages. Lord Denning M.R. said:[27]

> The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages.

Salmon L.J. said:[28]

> I cannot see how logically or on any principle of law the fact that the plaintiff has behaved rather badly and is a cantankerous old man can be even material when considering what is the proper compensation for the physical injury which he has suffered.

However, nine years later, the English Court of Appeal reached an opposite conclusion in a decision[29] that was barely consistent with *Lane v. Holloway*.

Canadian authority is divided. In a number of cases, account has been taken of the plaintiff's conduct in assessing damages for assault,[30] but the

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[24] See, for example, Waddams, *The Law of Damages* (1983), para. 1021, at 590.

[25] For the distinction between exemplary damages and aggravated damages, see *Walker v. CFTO* (1987), 59 O.R. (2d) 104, at 111, 39 C.C.L.T. 121 (C.A.).

[26] [1968] 1 Q.B. 379, [1967] 3 W.L.R. 1003 (C.A.) (subsequent references are to [1968] 1 Q.B.).

[27] *Ibid.*, at 387.

[28] *Ibid.*, at 390.

[29] *Murphy v. Culhane*, [1977] Q.B. 94, [1976] 3 W.L.R. 458 (C.A.).

[30] See *Veinot v. Veinot* (1976), 22 N.S.R. (2d) 77, 31 A.P.R. 77 (S.C., T.D.), aff'd (1977), 31 A.P.R. 630, 81 D.L.R. (3d) 549 (N.S.S.C., App. Div.), and *Griggs v. Southside Hotel Ltd.*, [1947] O.R. 674, [1946] 4 D.L.R. 73 (H.C.J.), aff'd [1947] O.R. 680, [1947] 4 D.L.R. 49 (C.A.).

Courts of Appeal of Manitoba[31] and Ontario[32] have expressly followed *Lane v. Holloway*. In the most recent Ontario case, *Long v. Gardner*[33] Smith J. held that, although the existing legislation could be interpreted to permit apportionment in a case of assault, it was doubtful whether provocation (not in itself tortious) should ever be properly taken into account to reduce compensation.

The following points may be made in favour of the view that compensatory damages ought not to be reduced on account of provocation. No question of punishment is in issue, and there seems to be no reason why the defendant should not pay for the actual loss admittedly caused by her wrong. To deprive the plaintiff of full compensation is to effect a forfeiture by taking away from her, on account of conduct of which the court disapproves, compensation to which the plaintiff is entitled by the general principles of compensatory damages.

The Commission is not fully persuaded by these arguments. But even if it were persuaded, it would still recommend that legislation not preclude apportionment in cases of provocation. The problem is a difficult and controversial one, and its solution would seem to be best left to the courts. There is merit in uniformity of legislation on this point. The decision in *Long v. Gardner* indicates that, even where no express exception is made, the courts are still free to reduce the plaintiff's share of fault to an insignificant proportion.

For the above reasons, the Commission recommends that the proposed apportionment legislation should apply to all cases of assault and battery, whether or not the resulting injury was intended, and regardless of provocation.[34]

b. Trespass and Nuisance

It has recently been established by the Ontario Court of Appeal, overruling an earlier case,[35] that apportionment under the current legislation is available in cases of trespass, at least where the defendant is negligent. In *Bell Canada v. Cope (Sarnia) Ltd.*,[36] the defendant had deliberately destroyed a telephone cable, in the mistaken belief that it was abandoned

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[31] *Check v. Andrews Hotel Co. Ltd.* (1974), 56 D.L.R. (3d) 364, [1975] 4 W.W.R. 370 (Man. C.A.).

[32] *Shaw v. Gorter* (1977), 16 O.R. (2d) 19, 77 D.L.R. (3d) 50 (C.A.), and *Landry v. Patterson* (1978), 22 O.R. (2d) 335, 93 D.L.R. (3d) 345 (C.A.).

[33] (1983), 144 D.L.R. (3d) 73 (Ont. H.C.J.).

[34] Draft Act, s. 2(2)(a).

[35] *Hollebone v. Barnard*, [1954] O.R. 236, [1954] 2 D.L.R. 278 (H.C.J.).

[36] *Supra*, note 15. For the facts of the case, see the judgment of Linden J. at (1980), 11 C.C.L.T. 170 (Ont. H.C.J.).

and useless. The facts of this case illustrate that trespass can be intentional without the defendant intending to cause the harm suffered. The same can be true in cases of nuisance. In such circumstances, apportionment seems appropriate. Where the harm is actually intended, it can be expected that, even under legislation requiring apportionment, the court would generally allow full or virtually full recovery to the plaintiff.[37] It is recommended, therefore, that, under the proposed legislation, apportionment should be available in cases of trespass or nuisance.[38]

c. Fraud

It has long been established that the gullibility of the plaintiff in believing the defendant's misrepresentation, or lack of care in failing to make an independent investigation, is no defence in an action based on fraud.[39] It does not lie in the mouth of one who makes a statement on which another relies to say that the other was careless in believing her. Although the wording of the Uniform Act would appear to permit apportionment between fraudulent and negligent tortfeasors, it would seem that it was not intended to alter the abovementioned rule. In *Anderson v. Stevens*,[40] the British Columbia Supreme Court held, in a contribution case, that the word "fault" in the provincial *Negligence Act*[41] included fraud, and therefore that the Act permitted contribution between fraudulent and negligent tortfeasors. It has not been suggested that this decision has the effect of reversing the rule that carelessness in believing a misrepresentation is no defence.

Cases can be imagined where apportionment between fraudulent and negligent tortfeasors would be appropriate, as, for example, where the defendant fraudulently induces the plaintiff to purchase defective goods, and the plaintiff then unreasonably uses them after observing the defect. It would seem likely that, even if the power of apportionment is extended to cases of fraud, the courts are unlikely to use the power where the plaintiff's only fault is to have relied on the defendant's word. Consequently, it is recommended that, under the proposed legislation, apportionment should be available in cases of fraud.[42]

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[37] See *Long v. Gardner*, *supra*, note 33.

[38] Draft Act, s. 2(2)(a).

[39] See Fleming, *supra*, note 3, at 601, and *Redgrave v. Hurd* (1881), 20 Ch.D. 1, [1881-85] All E.R. Rep. 77 (C.A.) (equitable relief not affected).

[40] (1981), 125 D.L.R. (3d) 736, [1981] 5 W.W.R. 550 (B.C.S.C.).

[41] R.S.B.C. 1979, c. 298.

[42] Draft Act, s. 2(2)(a).

d. Conversion and Related Torts

A question arises whether contributory negligence ought to apply in conversion and other similar actions involving the wrongful interference with goods, such as trespass, or indeed where the true owner has recovered the goods without the assistance of a court.

In some cases, apportionment seems appropriate, particularly where the wrongdoer has not actually benefited from the tort. Professor Williams gives the example of a defendant who pays money for property to a third party whose fraud against the plaintiff has been facilitated by the plaintiff's carelessness.[43] To give another example, the defendant, acting on the plaintiff's negligent assurance that certain property belongs to the defendant, may donate the property to a charity.

The Commission is considering, in its current Project on Remedies for Wrongful Interference with Goods, the relationship between contributory negligence and the property torts. Accordingly, we make no recommendation on this matter in this Report.[44]

e. Defamation

A further issue arises concerning whether apportionment should be available in cases of defamation. A case could be imagined where the plaintiff carelessly leads the defendant to believe that the plaintiff is guilty of a crime, perhaps by behaving in a suspicious manner and by unreasonably refusing to give an explanation of her conduct. If the defendant subsequently publishes an allegation that the plaintiff has committed the crime, it could be said that the fault of the plaintiff has contributed to the resulting damage. One commentator has written that the plaintiff's conduct is a factor that the jury is entitled to take into account even apart from apportionment legislation.[45] Plainly, it would reduce any punitive element in the damages and often would be taken into account in the somewhat vague process of assessment of compensatory damages.

We note that the Uniform Act, extending apportionment to all torts, would apply to the tort of defamation. The Commission agrees and, accordingly, we recommend that the proposed legislation governing apportionment should apply in cases of defamation.[46]

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[43] Williams, *supra*, note 20, at 212. However, Williams states that "it is usually held that the defendant has no defence to an action for conversion even though he has given full value for the property to a deceitful stranger and even though the plaintiff is guilty of contributory negligence" (*ibid.*).

[44] Draft Act, s. 2(2)(a).

[45] Lewis (ed.), *Gatley on Libel and Slander* (8th ed., 1981), §1451, at 592-93.

[46] Draft Act, s. 2(2)(a).

(c) Breach of Contract

(i) Present Law

Even in the absence of apportionment legislation specifically applicable to breach of contract, conduct of the plaintiff that contributes to damage caused by the defendant's breach of contract can operate as a defence in a variety of ways. It may be said that the plaintiff's conduct breaks the chain of causation, that it makes the damage claimed too remote, or that the scope of the defendant's obligation is impliedly restricted. Furthermore, in many cases, the plaintiff's careless failure to protect her own interests will occur after the defendant's breach and will operate as a failure to mitigate loss.[47]

These defences, however, compel an all or nothing choice. Consider, as an example, the facts of *Lexmead (Basingstoke) Ltd. v. Lewis*,[48] where a seller, in breach of warranty, supplied a defective trailer hitch, and the buyer suffered loss by carelessly using it, knowing it to be damaged. It is not clear whether, in general, plaintiffs or defendants benefit from all or nothing choices. Denying the possibility of an intermediate solution is no benefit to the plaintiff if it leads the court to hold that the defendant's breach of contract cannot be said to have caused the plaintiff's loss or that the defendant's warranty cannot be construed to apply in the circumstances. In many cases where a loss is caused partly by the defendant's wrong and partly by the plaintiff's carelessness, there seems as strong a case as elsewhere for apportionment.

Under existing law, there are three techniques whereby apportionment may be made available in contract cases. It may be held (1) that the *Negligence Act*[49] applies to contracts, or (2) that the breach of contract also constitutes a tort to which the *Negligence Act* applies, or (3) that apportionment is available in contract cases at common law, irrespective of the *Negligence Act*.

A number of cases decided at first instance in England[50] and British

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[47] It has been pointed out that the doctrine of mitigation applies in many cases that would be treated, from the tort point of view, as cases of contributory negligence, because a breach of contract (unlike the tort of negligence) is actionable before any damage occurs, so that the duty to mitigate operates as soon as the plaintiff knows of the breach, and if the plaintiff can then, acting reasonably, avoid a loss but fails to do so, recovery will be denied. See Coote, "Contract, Tort and Contributory Negligence", [1982] N.Z.L.J. 294.

[48] [1982] A.C. 225, [1981] 2 W.L.R. 713 (H.L.).

[49] *Supra*, note 6.

[50] *De Meza v. Apple*, [1974] 1 Lloyd's Rep. 508 (Q.B.), aff'd on other grounds [1975] 1 Lloyd's Rep. 498 (C.A.), and *Artingstoll v. Hewen's Garages Ltd.*, [1973] R.T.R. 197 (Q.B.). But see *Basildon District Council v. J.E. Lesser (Properties) Ltd.*, [1985] Q.B. 839, [1984] 3 W.L.R. 812, and *Rowe v. Turner Hopkins & Partners*, [1980] 2 N.Z.L.R.

Columbia[51] have held that the word "fault" in the apportionment legislation of those jurisdictions extends to breach of contract. In the Ontario case of *Bank of Nova Scotia v. Terry*,[52] a similar conclusion was reached by the trial judge, although the decision was reversed on appeal. There, a bank had suffered a loss on account of the negligence of the defendant solicitor, but the loss could have been avoided by care on the part of the bank in its dealings with the solicitor. At trial, O'Brien J. held that, even if the liability of the solicitor was based in contract only, the *Negligence Act* applied:[53]

> I am satisfied the damages which flowed from her action were a result of 'fault' which I find to be a term of broader meaning than negligence.

It is not, however, clear that this interpretation will be accepted by higher courts. As indicated, *Terry* was reversed on appeal.[54] In *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.*,[55] the Ontario Court of Appeal held that the word "fault" in the contribution section of the *Negligence Act* did not apply to breaches of contract, and the Supreme Court of Canada, without definitely deciding the point, inclined to the same view.[56] It is true that the case was concerned with contribution among wrongdoers and not with contributory negligence; however, a decision on the meaning of the word "fault" in a provision separated by only one section from the contributory negligence section must be highly persuasive on the construction of section 4.

Turning to the second means of apportioning damages in contract cases, a series of decisions, of which the *Dominion Chain Co. Ltd.* case is

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550 (H.C.). See, also, Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1981), 55 Austl. L.J. 278, at 283-85.

[51] *West Coast Finance Ltd. v. Gunderson, Stokes, Walton & Co.* (1974), 44 D.L.R. (3d) 232, [1974] 2 W.W.R. 428 (B.C.S.C.), rev'd on other grounds (1975), 56 D.L.R. (3d) 460 (B.C.C.A.); *Emil Anderson Constr. Co. Ltd. v. Kaiser Coal Ltd.*, unreported (1972, B.C.S.C.), referred to in *Truman v. Sparlling Real Estate Ltd.* (1977), 3 C.C.L.T. 205 (B.C.S.C.); and *Carmichael v. Mayo Lumber Co. Ltd.* (1978), 85 D.L.R. (3d) 538 (B.C.S.C.).

[52] (1982), 141 D.L.R. (3d) 438 (Ont. H.C.J.), rev'd (1984), 46 O.R. (2d) 180, 9 D.L.R. (4th) 101 (C.A.) (subsequent reference is to 141 D.L.R. (3d)).

[53] *Ibid.*, at 450.

[54] *Supra*, note 52. In *Husky Oil Operation Ltd. v. Oster* (1978), 87 D.L.R. (3d) 86 (Sask. Q.B.), at 91, the Saskatchewan *Contributory Negligence Act*, R.S.S. 1965, c. 91, was said to be "of course, without applicability in the case of a breach of contract", but liability was apportioned on the basis of concurrent liability in tort. A similar result was reached in *Canadian Western Natural Gas Co. Ltd. v. Pathfinder Surveys Ltd.* (1980), 12 Alta. L.R. (2d) 135 (C.A.).

[55] (1976), 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A.), aff'd (*sub nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*) [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 (subsequent references are to [1978] 2 S.C.R.). See, also, *Dabous v. Zuliani* (1976), 12 O.R. (2d) 230, 68 D.L.R. (3d) 414 (C.A.).

[56] *Supra*, note 55, at 1354.

one, has held that a breach of a contractual duty of care constitutes a tort.[57] Thus, apportionment may be available under the *Negligence Act* on the basis that the plaintiff's action lies in tort. What is not clear is whether the plaintiff, should she wish to do so, can avoid the possibility of apportionment by bringing her action solely in contract. It cannot be satisfactory for the availability of apportionment to depend on the form of action chosen by the plaintiff.

The third technique of apportioning damages in contract cases is to hold that, even though the *Negligence Act* does not apply, damages can be apportioned at common law by analogy with the Act. This bold and novel approach has been adopted in two recent Ontario cases at first instance,[58] and was described by the Ontario Court of Appeal in *Cosyns v. Smith*[59] as an "attractive conclusion", although the point did not require a definite decision in that case.

(ii) Should All Breaches of Contract be Affected?

a. General

The Canadian Uniform Act limits its scope to "a breach of duty of care arising from a contract that creates a liability for damages".[60] This was a carefully considered limitation. In the draft presented for consideration in 1983,[61] the corresponding definition had included any breach of contract that created a liability in damages, but this version was not approved.[62]

The Report of the Alberta Institute of Law Research and Reform, upon which the Uniform Act was based, had recommended that not all breaches of contract should give rise to a right to apportionment. The Institute stated:[63]

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[57] *Husky Oil Operation Ltd. v. Oster*, *supra*, note 54; *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*, [1979] Ch. 384, [1978] 3 W.L.R. 167; *Jacobson Ford-Mercury Sales Ltd. v. Sivertz* (1979), 103 D.L.R. (3d) 480, [1980] 1 W.W.R. 141 (B.C.S.C.); and *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 (N.B.C.A.).

[58] *Tompkins Hardware Ltd. v. North Western Flying Services Ltd.* (1982), 139 D.L.R. (3d) 329 (Ont. H.C.J.), and *Ribic v. Weinstein* (1982), 140 D.L.R. (3d) 258 (Ont. H.C.J.).

[59] (1983), 146 D.L.R. (3d) 622 (Ont. C.A.), at 628. See, also, *Smith v. McInnis*, [1978] 2 S.C.R. 1357, at 1377-78, 91 D.L.R. (3d) 190, *per* Pigeon J., dissenting, and *Speed v. Finance America Realty Ltd.* (1979), 11 R.P.R. 161 (N.S.S.C., App. Div.).

[60] *Supra*, note 7, s. 1(c), under "fault".

[61] See Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983), at 28, and *Proceedings of the Sixty-Fourth Annual Meeting* (1982), Appendix J, at 162.

[62] See *Proceedings of the Sixty-Fifth Annual Meeting*, *supra*, note 61, at 28.

[63] Alberta Report, *supra*, note 8, at 15.

> We think that the principle of contributory negligence should not be extended to all breaches of contract. Contributory negligence is not relevant in regard to a contract which imposes an absolute obligation, for instance, to deliver a certain quantity of wheat.

The Report went on to point out, however, that where a contractual duty of care was in issue, concurrent liability in tort was usually present, and that it would be anomalous to make the availability of apportionment depend on the form of action selected by the plaintiff.[64] The Institute conceded that there would be difficulties in distinguishing between cases of breach of a contractual duty of care and breaches of other contractual obligations,[65] but nevertheless recommended that apportionment should be available only in case of breach of a duty of care.

The English Law Commission, in declining to recommend changes to the law of contributory negligence in the context of its *Report on Contribution*,[66] referred to difficulties that could arise if apportionment were available in respect of breaches of contract. The Commission stated:[67]

> In our working paper we mentioned that the existing law of contributory negligence might be in need of reform but that it was not appropriate to deal with it as part of our work on the law of contribution. We drew attention to the difficulties in the existing law where the plaintiff claims damages for breach of contract. It may be that where the breach of contract in question consists of the breach of a contractual duty of care the defendant is entitled to a reduction in damages for which he is otherwise liable on the ground of the plaintiff's contributory negligence. However, where the contractual breach is of a duty other than a duty of care contributory negligence on the part of the plaintiff is not, it seems, available as a partial defence. Many of those we consulted expressed the view that this was an anomaly, and that the Law Reform (Contributory Negligence) Act 1945 should be examined with a view to its reform. Some went further and proposed that the overhaul of the law of contributory negligence should be done at the same time as that of the law of contribution; they pointed out that the subjects were related and to take them separately would mean reforms of a 'piecemeal' kind. These arguments have force and if we were satisfied that the reform of the law of contributory negligence could be dealt with satisfactorily in a summary way we might have felt able to adopt them. However we doubt whether the partial defence of contributory negligence could be slotted into the general law of contract without serious repercussions on, for instance, the present law of 'discharge by breach' and on the assessment of damages for breach of contract. Take, for example, the familiar case of the builder who abandons work because the person who engaged him has delayed the payment of an installment. If he is not entitled, by the other's breach, to stop work altogether, should he nevertheless

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[64] *Ibid.*, at 24.

[65] *Ibid.*, at 25.

[66] England, The Law Commission, *Law of Contract: Report on Contribution*, Law Com. No. 79 (1977).

[67] *Ibid.*, para. 30, at 9-10.

> be allowed to rely on it as a partial defence to a claim for damages? Our preliminary view when we referred to the topic of contributory negligence in our working paper was that its reform would call for deeper study than we could conveniently give it in a paper on contribution. We are still of this view, and are supported in it by comments we received from those we consulted. We are therefore not making any proposals in this report for changes in the law of contributory negligence.

Other cases can be envisaged in which apportionment might lead to odd results. Often, where the defendant has made a disadvantageous bargain, she is looking for an excuse to terminate the contract. Consider the case of a charter party on terms that have turned out to be advantageous to the charterer. The owner may decide to scrutinize the charterer's performance in order to detect a deficiency. The charterer carelessly makes a freight payment a few hours late, and the owner purports to terminate. Under the present law, if it is determined that the termination is wrongful, the owner will be liable to pay compensation in full for the charterer's loss. It would seem odd to introduce apportionment in a case like this. The charterer's loss in such a case is usually equal to the owner's gain. There is incentive enough under the present law for the owner to repudiate her obligation. It would greatly increase the incentive if the prospect were added that, even if found to be in breach of contract, the owner might not have to pay full compensation. This would enable a contract breaker to retain a benefit (a part of the benefit of the bargain) as a result of her own wrong.

Another difficult case is that of specific performance. Suppose D agrees to sell Blackacre to P at a price of $100,000. D then discovers that the value of Blackacre is $150,000 and instructs her solicitor to seek a justification to terminate. P commits a minor breach of contract, and D, in breach of her own obligations, purports to terminate. If P obtains a decree of specific performance, she will capture the whole benefit of the bargain, and it would be anomalous to have a rule of damage assessment that differed substantially in economic effect. The *Courts of Justice Act, 1984*,[68] empowers the court to award damages in substitution for an award of specific performance, thereby implying that such an award would have equivalent economic effect. Again, if specific performance had a substantially more beneficial effect than an award of damages, there would be a case for a widespread extension of the right to specific performance, for the basic test for availability of specific performance is inadequacy of an award of damages. If an award of damages were liable to fall short of full compensation because of apportionment, the plaintiff would be able to argue that this alone justified a decree of specific performance.

These problems might be met with the argument that the courts would not be compelled in practice to apportion damages, even if the statute were extended to cover all breaches of contract. On the other hand, in view of the limited scope of the Canadian Uniform Act[69] and the hesitation exhibited

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[68] S.O. 1984, c. 11, s. 112.

[69] See *supra*, note 60 and accompanying text.

by law reform bodies in other jurisdictions, it would seem somewhat rash to recommend extension of apportionment to all breaches of contract unless there is a very strong case for such a reform. Before reaching a conclusion, various possible approaches, other than that suggested by the Uniform Act, will be discussed.

b. Possible Approaches to Apportionment for Breach of Contract

(1) Breach of Warranty and Physical Damage

The American Uniform Comparative Fault Act[70] defines "fault" as follows:

> 1.—(b) 'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. . . .

On the inclusion of breach of warranty, the Comment to the American Uniform Act states:[71]

> An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The modern American law of strict products liability has developed largely from the concept of warranty[72] and it would be anomalous for apportionment to apply to products liability actions framed in tort but not to those framed in warranty. In the Ontario law of products liability, the law of warranty imposes, within a limited class of cases, a strict liability for damage caused by defective products.[73] In a case where the plaintiff's loss is caused partly by breach of warranty and partly by careless use of the product—as, for example, in the case of the defective trailer hitch, discussed above[74]—apportionment seems appropriate. Indeed, it is not clear that the

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[70] National Conference of Commissioners on Uniform State Laws, Uniform Comparative Fault Act, Uniform Laws Annotated, Vol. 12 (1988 Pocket Part).

[71] *Ibid.*, 1988 Pocket Part, at 39.

[72] See Prosser, "The Fall of the Citadel" (1966), 50 Minn. L. Rev. 791.

[73] See Ontario Law Reform Commission, *Report on Products Liability*, *supra*, note 10, at 23-27.

[74] See text accompanying note 48, *supra*.

exclusion of apportionment is beneficial to plaintiffs because, as indicated above, an "all or nothing" choice will often leave the plaintiff with nothing.

This Commission, in its 1979 *Report on Products Liability*, recommended a rule of strict liability for defective products and that apportionment should apply in case of a loss contributed to by the plaintiff's negligence.[75] Consistent with this conclusion, we are of the view that apportionment should apply at least to cases of physical damage caused under the present law by breach of warranty of the supplier of a product. A case can also be made for including other breaches of contract that cause physical damage. There seems to be no good reason to exclude apportionment in the case of a breach of warranty by a supplier of services, or, indeed, any breach of contract, that causes personal injury or property damage. These are not the types of case, identified above, in which the contract breaker profits at the expense of the innocent party.[76]

(2) Reliance on Promised Performance

In its Working Paper on contribution,[77] the New Zealand Contracts and Commercial Law Reform Committee referred to the restriction of apportionment, in the Alberta Institute's Report, to cases of breach of a duty of care, and said that it was "inclined tentatively to prefer a reform of wider application".[78] Nevertheless, the Committee proposed to limit the application of apportionment in case of breach of contract by another principle. Its proposal reads as follows:[79]

> (1) For the purposes of this Act 'fault' means, on the part of a plaintiff or defendant (and whether by act or omission), negligence, breach of statutory duty, breach of contract or any other breach of a civil duty owed by the one to the other and, in the case of a plaintiff, any unjustified failure to take adequate care for his own interests.
>
> (2) A failure by a plaintiff to take adequate care for his own interests is unjustified if it is not excused (i) by the terms of a contract or other agreement between the plaintiff and the defendant, or (ii) by the rules of the common law or of equity, or (iii) by the provisions of any enactment.
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> (3) Care taken by a plaintiff for his interests is not inadequate, by reason only and to the extent that it constitutes a failure to take precautions against

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[75] See *supra*, note 10, at 96-97, and s. 6(1) of the Draft Bill proposed in the *Report on Products Liability*, *supra*, note 10.

[76] See discussion *supra*, this ch., sec. 2(c)(ii)a.

[77] New Zealand, Contracts and Commercial Law Reform Committee, *Working Paper on Contribution in Civil Cases* (1983).

[78] *Ibid.*, para. 8.6, at 25.

[79] *Ibid.*, para. 9.1, at 30.

(a) the breach by the defendant of an obligation owed to the plaintiff under the terms of a contract, or

(b) the deliberate fault of a defendant before the plaintiff knows or ought to be taken to know that, as the case may be, the breach or the deliberate fault has occurred.

By way of explanation, the Committee stated:[80]

> [I]t is (agreement apart) not open to a contract-breaker to suggest that the innocent party showed lack of care because, before breach, he acted on the basis that the wrongdoer would perform his contract. Hence, in a case, say, between a building owner and a contractor, it could not be held against the owner that he failed to tell the contractor all he knew about the site if the entire responsibility for its suitability had been allocated to the contractor by the building contract.

This restriction would, it seems, exclude apportionment in many cases where apportionment would be permitted under the terms of the Canadian Uniform Act. For example, in a case where loss was caused by the defendant's negligent professional opinion based on misleading or incomplete information given by the plaintiff, apportionment would be excluded. It is not clear, therefore, that the New Zealand proposal is wider than the Uniform Act, for in the case just mentioned it seems that the Uniform Act would permit apportionment. Furthermore, there seems to be no strong reason to exclude apportionment in such cases unless the agreement allocates the entire risk to the defendant.[81]

The Commission recommends that, subject to the recommendation we make later concerning the right of the parties to agree otherwise,[82] apportionment should not be excluded where the plaintiff has relied on the defendant's contractual assurance of performance.[83] Accordingly, where, for example, the plaintiff has negligently withheld critical information from the defendant, thereby affecting the defendant's performance, apportionment would be available. However, where the plaintiff has not acted in this manner, and where the plaintiff's reliance on the defendant's assurance of performance is reasonable, there would be no basis for finding that the plaintiff's negligence has contributed to the loss.[84]

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[80] *Ibid.*, para. 8.6(d), at 29.

[81] As in *Bank of Nova Scotia v. Terry*, *supra*, note 52.

[82] See *infra*, this ch., sec. 2(c)(ii)c.

[83] Draft Act, s. 2(2)(c) and (d).

[84] In *Sirois v. Federation des Enseignants du Nouveau-Brunswick* (1984), 56 N.B.R. (2d) 50, 28 C.C.L.T. 280 (Q.B.), a teachers' federation was held to be liable in tort for misinforming its members of their rights to unemployment insurance benefits, but the members were held to have been contributorily negligent in not consulting the association office, as invited. Apportionment would seem appropriate in a similar case based on breach of contract.

(3) Deliberate Breach

Professor Williams, in discussing the scope of contributory negligence at common law, suggests that the defence applied to "unintentional" breaches of contract,[85] and, in discussing the scope of the English apportionment legislation, he suggests that "fault" extends to negligent breaches of contract.[86] In his draft Act, however, he includes all breaches of contract "whether or not the wrong is intentional".[87] Often an intentional breach of contract causes unintended harm. As in the case of torts, discussed above,[88] there seems no strong reason to exclude intentional breaches of contract from the scope of the apportionment legislation, and we so recommend.[89]

c. Conclusions

As has been shown, there are a considerable number of difficulties in this area. The Canadian Uniform Act deals with the strongest case for apportionment, that is, where there is a breach of a contractual duty of care—a case where there is concurrent liability in contract and tort and where a serious anomaly would arise in permitting apportionment in the one form of action and denying it in the other. Consequently, we have concluded that Ontario should go at least as far as the Uniform Act.

Should it go further? There is a strong argument for including all breaches of contract in the legislation and leaving it to the courts to exclude apportionment in the appropriate cases. Further, there is the danger of inhibiting the development of the power of apportionment at common law, a power asserted by some recent Ontario cases. On the other hand, the inclusion of all contracts may attract criticism along the lines discussed above, and it may seem a weak response to say, with respect to legislation on its face positively requiring apportionment, that the courts can be expected not to apportion in improper cases. On balance, we have concluded that the proposed apportionment legislation should not apply to all breaches of contract, but that, subject to certain amendments and one extension, the position of the Uniform Act should be adopted.

Accordingly, we recommend that, like the Uniform Act, the proposed *Contribution and Comparative Fault Act* should contain a provision making apportionment applicable in the case of breach of a duty of care arising from a contract that creates a liability for damages.[90] For reasons stated

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[85] Williams, *supra*, note 22, at 214 *et seq*.

[86] *Ibid*., at 328 *et seq*.

[87] *Ibid*., at 529, s. 39(1) (definition of "wrong").

[88] See *supra*, this ch., sec. 2(b)(iii).

[89] See the closing portion of Draft Act, s. 2(2).

[90] *Ibid*., s. 2(2)(c).

above,[91] we would go further than the Uniform Act in one respect and recommend that apportionment should apply in the case of personal injury or property damage caused by a breach of contract.[92] Apportionment for loss caused by breach of contract should, however, be subject to any agreement, express or implied.[93] Finally, we have concluded that, as a general principle, the proposed Act should also provide that nothing in the Act shall be construed to remove any power of apportionment the courts have apart from statute. We shall deal with this matter below.[94]

(d) Breach of Statutory Duty

The Canadian Uniform Act includes in its definition of "fault" in section 1 "a breach of a statutory duty that creates a liability for damages". It has been recently held by the Supreme Court of Canada that a breach of a statutory duty does not in itself give rise to civil liability.[95] However, there are cases where the Legislature expressly creates a cause of action and, in such cases, in the absence of a contrary intention in the legislation, there seems no reason to exclude apportionment. Accordingly, it is recommended that, like the Uniform Act, the proposed *Contribution and Comparative Fault Act* should include a provision extending apportionment to a breach of a statutory duty that creates a liability in damages.[96]

(e) Breach of Fiduciary Duty

In this section, we shall consider whether the partial defence of contributory fault ought to be extended by statute to breach of fiduciary duty, including breach of trust. The issue is controversial, particularly in the traditional trust context, given the nature of the relationship between beneficiary and trustee and the onerous duties placed on the latter. The matter has also generated some debate in the context of other fiduciary relationships, having regard to the gradual extension, for a variety of reasons, of "fiduciary" obligations into different areas, although it is not entirely clear to what extent these new fiduciary relationships give rise to the same rights and duties as those found in the ordinary trust context.

There is virtually no legislation,[97] and little case law, concerning the relationship between contributory fault and breach of fiduciary duty.

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[91] *Supra*, this ch., sec. 2(c)(ii)b(1).

[92] Draft Act, s. 2(2)(d).

[93] *Ibid.*, s. 2(4).

[94] *Infra*, this ch., sec. 9.

[95] *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.

[96] Draft Act, s. 2(2)(b).

[97] Although see s. 34(1) of the *Trustee Act*, R.S.O. 1980, c. 512. Under this section, where a

However, in *Carl B. Potter Ltd. v. The Mercantile Bank of Canada*,[98] the Supreme Court of Canada did consider the question whether the term "fault" in the Nova Scotia *Contributory Negligence Act*[99] was wide enough to include a breach of trust. Ritchie J., for the Court, stated that, "whatever extended meaning may be given to the word 'fault' it must involve a breach of duty of some kind".[100] He then went on to say that there was "no authority for the proposition that a *cestui que trust* owes a duty to its trustee to ensure that the terms of the trust are observed".[101]

In a recent New Zealand case, *Day v. Mead*,[102] the Court of Appeal reached the opposite conclusion in a different fiduciary context. In that case, the plaintiff sued his former solicitor, who had advised the plaintiff to invest in a company of which the solicitor was a director. The solicitor failed to make adequate disclosure of this conflict of interest as well as other conflicts. The company ultimately went into receivership. The trial judge held for the plaintiff, but reduced the damages awarded on the ground that, before making the investment, it would have been prudent for the plaintiff to obtain completely independent and competent financial advice. The plaintiff appealed, arguing that damages for compensation for breach of fiduciary duty were not apportionable. The appeal was dismissed.

The reasons for dismissing the plaintiff's appeal differ from one judge to another, although all members of the Court of Appeal were willing to import some notion of comparative fault or responsibility into the equitable context under consideration. However, it bears emphasizing that the President of the Court did acknowledge that, having regard to the high standard of conduct expected of fiduciaries, a strong case must be made out to relieve a fiduciary of complete responsibility.

While the Alberta Report does address the issue, at least insofar as trusts are concerned, it offers very little assistance in determining precisely why contributory fault should or should not be made applicable in that

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breach of trust is actually requested, or consented to in writing, by a beneficiary, the court has a power to make "such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee...". In its *Report on the Law of Trusts* (1984), Vol. II, at 384, the Commission recommended that this power should be continued in the *Trustee Act* proposed in that Report.

98 [1980] 2 S.C.R. 343.

99 R.S.N.S. 1967, c. 54, s. 1.

100 *Supra*, note 98, at 352.

101 *Ibid.*

102 Unreported (July 31, 1987, N.Z.C.A.). The facts appear in the report on an interlocutory matter: *Mead v. Day*, [1985] 1 N.Z.L.R. 100. For a recent discussion of this case and its implications, see "Compensation for Breach of Fiduciary Duty", by the Honourable Mr. Justice Gummow, of the Federal Court of Australia, a paper presented to The International Symposium on Trusts, Equity and Fiduciary Obligations, Faculty of Law, University of Victoria (February 14-17, 1988). The discussion appears at 40-48.

context. The Alberta Institute of Law Research and Reform, in deciding to exclude breach of trust from the scope of the apportionment legislation, dealt with the matter as follows: "We think that the liability between the trustees and the beneficiaries of trusts are [*sic*] adequately and properly covered by the law of trusts".[103] Since the Uniform Act is based largely on the Alberta Report, it is not surprising that the Act contains no reference to a breach of trust. Nor did this Commission examine the general issue of apportionment of damages between beneficiary and trustee in its *Report on the Law of Trusts*.[104]

The issue under consideration is, we believe, an important one. It is, as well, exceedingly difficult, and is complicated by the increasing number and variety of situations in which a fiduciary obligation is now imposed as a matter of law. It may be that a case can be made for extending apportionment to some breaches of fiduciary duty—perhaps, for example, where such a duty arises in commercial situations quite distinct from the more traditional trust context.

However, the Commission is not convinced that a *statutory* extension of the doctrine is desirable, at least at this time. For one thing, it may be argued forcefully that the essence of a fiduciary, and especially a trust, relationship is that the beneficiary should be entitled to rely entirely on the fiduciary, and that the beneficiary should not be penalized for failing to take independent steps to protect her own interests or to check that the fiduciary is doing her duty. While the notions of fault or negligence pertain to the duty to take reasonable care, the duty of a fiduciary is, as we have said, considerably higher. There is a danger, then, that the introduction of contributory fault will subvert or dilute this stricter duty.

Moreover, the law in this area is fluid and developing; for this reason, we are of the opinion that further time is needed to examine more fully whether contributory fault is an appropriate principle to be imported into the many different contexts in which a fiduciary obligation is imposed. Such an examination can and, in our view, should be undertaken by the courts. It will be recalled that a similar type of approach has been proposed by the Commission with respect to breaches of contract.[105]

Accordingly, the Commission recommends that the proposed apportionment legislation should not be extended to breach of fiduciary duty, including breach of trust. Rather, the issue of the applicability of apportionment in this context should be left to be determined by the courts on a case-by-case basis.[106]

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[103] Alberta Report, *supra*, note 8, at 25.

[104] But see *supra*, note 97.

[105] See *supra*, this ch., sec. 2(c)(ii)c.

[106] Draft Act, s. 2(7). See, further, *infra*, this ch., sec. 9.

(f) Losses Subject to Apportionment

In the previous sections of this chapter, we recommended that apportionment should be available where liability for damages arises from a tort or breach of statutory duty, or from a breach of contract that causes physical damage (that is, personal injury or property damage) or a breach of a contractual duty of care. The issue to be resolved in this section concerns the kinds of loss that ought to be subject to apportionment, bearing in mind these recommendations.

Under the American Uniform Comparative Fault Act, although the "specific application of [the principle of apportionment]...is confined to physical harm to person or property", the Comment is clear that this principle "necessarily includes consequential damages deriving from the physical harm".[107] While "matters like economic loss" are not specifically included in the types of loss subject to apportionment, the Comment states that apportionment may still apply under the common law.[108]

The former versions of the Canadian *Uniform Contributory Fault Act* did not deal expressly with the issue. However, in a Report by the Alberta Commissioners to the Uniform Law Conference of Canada, made prior to the adoption of the final version of the Act, the Alberta Commissioners stated:[109]

> We are not sure...that damage to person or property includes economic loss, or that a failure to take care of person or property includes a failure to take care of one's economic interests. We take it that, if the Conference intends to extend the defence of contributory fault to all claims based on contract, it must intend to include claims for economic loss. We would recommend that, whether or not the Conference makes the extension, the terminology be changed so that 'damage' would clearly include economic loss, and so that contributory 'fault' would clearly include a failure of a person to take reasonable care of his own interests of any kind.

This view was accepted by the Conference, so that section 1 of the present Uniform Act defines "damage" to include "economic loss" and "fault" to include "a failure of a person to take reasonable care of his own person, property or economic interest".

The Commission believes that there are sound reasons for adopting the position taken in the Uniform Act and, therefore, permitting apportionment where any kind of loss has occurred as a result of the kinds of wrongdoing mentioned above. Problems could arise in framing legislation so as to draw a clear distinction between various types of loss. Attempts to

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[107] *Supra*, note 70, 1987 Pocket Part, at 40.

[108] *Ibid.*

[109] *Proceedings of the Sixty-Fourth Annual Meeting*, *supra*, note 55, Appendix I, "Contributory Fault and Contribution Report of the Alberta Commissioners" 118, at 120.

draw such a distinction for purposes of remoteness have proved to be very difficult. Moreover, many of the recent tort cases in which apportionment has been ordered under existing legislation have, in fact, involved economic loss, and there seems to us to be no strong reason to exclude apportionment in, for example, contract cases involving such loss.

For the foregoing reasons, therefore, we believe that it would be wiser to leave it to the courts to deal with apportionment in all cases, including those involving economic loss. As we have suggested earlier,[110] it would appear that the courts may exclude or limit apportionment in a proper case by attributing the loss in question entirely, or almost entirely, to the defendant's conduct. Accordingly, we recommend that apportionment should apply to all types of loss, including economic loss.[111]

3. SET OFF AND COUNTERCLAIM

Problems arise where, as is not uncommon, an accident causes damage to both responsible parties, and each claims compensation from the other. Suppose that P and D are equally responsible for an accident in which P's damage is $10,000 and D's damage is $20,000. If neither party is insured, there is no objection to giving judgment to D for $5,000, that is, the difference between $10,000 recoverable by D from P and $5,000 by P from D. If either party were insolvent, it would be most unjust to compel the other to pay full compensation with the prospect of recovering only a small fraction of her own judgment.

If, however, as is now required in Ontario up to certain limits for automobile drivers, P and D are insured against liability for the loss,[112] the effect of setting off the judgments would be to benefit the insurers. The parties have suffered compensable losses of $15,000, but only $5,000 would be paid out. One of the purposes of compulsory automobile insurance is to provide a source of compensation for loss caused by accidents and this purpose would be defeated if set off were allowed.

The Ontario Rules of Civil Procedure[113] provide as follows:

> 27.09(3) Where both the plaintiff in the main action and the plaintiff by counterclaim succeed, either in whole or in part, and there is a resulting balance in favour of one of them, the court may in a proper case give judgment for the balance and dismiss the smaller claim and may make such order for costs of the claim and counterclaim as is just.

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[110] See *supra*, this ch., sec. 2(b)(iii)a.

[111] Draft Act, s. 2(5).

[112] *Compulsory Automobile Insurance Act*, R.S.O. 1980, c. 83.

[113] Rules of Civil Procedure, O. Reg. 560/84.

Thus, the court has power to order a set off "in a proper case". Under the former Rules of Practice,[114] it appears that the practice was not to order a set off in cases where this would benefit insurers. In an automobile accident case in which a set off was opposed by the defendant but favoured by her insurer, the Ontario Court of Appeal said simply that a set off was "not in accordance with the practice".[115]

The same practice apparently obtains in Alberta. The Alberta Institute of Law Research and Reform said on this point:[116]

> The practice is not to provide for set-off in motor vehicle cases. We have concluded that it is best to leave the question to be decided by the court in each individual case, with the exception that in actions arising out of the operation of motor vehicles, the statute should provide that there shall be no set-off unless the court otherwise orders.

No such provision, however, appears in the Canadian Uniform Act. The express exclusion of motor vehicle cases seems too narrow, for the problem of a set off benefiting insurers could arise in cases other than automobile accidents. This point could be met by a provision along the lines of the original section 3 of the American Uniform Comparative Fault Act,[117] which provided:

> 3. A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the insured by the party liable.

Similarly, the Irish *Civil Liability Act, 1961*[118] has a special provision on insurance, which reads, in part, as follows:

> 36.—(4) ...[W]here a claim is made against a person who is insured in

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[114] R.R.O. 1980, Reg. 540, rr. 118 and 119. With respect to set offs, see the former *Judicature Act*, R.S.O. 1980, c. 223, ss. 134 and 136.

[115] *Wells v. Russell*, [1952] O.W.N. 521 (C.A.), at 522. See, also, *Lewenza v. Ruszczak* (1960), 22 D.L.R. (2d) 167 (Ont. C.A.), where a set off was refused in the case of an insurer suing by subrogation.

[116] Alberta Report, *supra*, note 8, at 27.

[117] *Supra*, note 70. The present § 3 reads as follows:

> 3. A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

[118] *Civil Liability Act, 1961*, No. 41, s. 36(4).

> respect of a liability alleged in that claim and the claim is paid by the insurer with a deduction in respect of a sum owed to the insured by the person making such claim, the insured or any person representing or deriving title under him shall be entitled to recover from the insurers the amount of the said deduction.

As is shown by a comparison of the above statutes, different approaches are possible to the drafting of provisions respecting set offs and counter-claims. Any such provision is certain to give rise to complexities of its own. There does not seem to have been any particular problem in this area. Moreover, the Canadian Uniform Act includes no such provision, and rule 27.09(3) of the Rules of Civil Procedure appears to give adequate discretion to the court. Accordingly, it is recommended that no specific provision be included on this matter.

4. COSTS

There are, at present, several relevant legislative provisions in Ontario dealing with costs. The *Negligence Act*[119] includes a provision on the award of costs in the context of the plaintiff's own negligence:

> 8. Where the damages are occasioned by the fault or negligence of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

The *Courts of Justice Act, 1984*[120] provides generally for an award of costs, as follows:

> 141.—(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Finally, rule 57.01(1)(b) of the Rules of Civil Procedure[121] provides that, in exercising its discretion under section 141, the court may consider, among other things, "the apportionment of liability".

Although there are some cases to the contrary,[122] the Ontario practice generally appears to be to award costs in the ordinary way to a successful plaintiff who recovers a judgment, notwithstanding the fact that, because of the plaintiff's contributory negligence, the amount awarded is less than the amount claimed.[123] This is said by the Alberta Institute of Law Research

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[119] *Supra*, note 6, s. 8.

[120] *Supra*, note 68, s. 141.

[121] *Supra*, note 113.

[122] See, for example, *Heggtveit v. Ottawa Brickcote Ltd.*, [1952] O.W.N. 541 (C.A.). See, also, *McConnell v. Alexander*, [1954] O.W.N. 61 (H.C.J.). The decision concerning costs in the latter case was amplified in *McConnell v. Alexander*, [1954] O.W.N. 266 (H.C.J.).

[123] In *Tiuri v. Canadian Pacific Railway*, [1938] O.W.N. 425 (C.A.), counsel for the defendant sought to have the Court exercise its jurisdiction to apportion costs under

and Reform also to be the practice in Alberta.[124] The Institute recommended that costs should continue to be dealt with under the general discretionary rule,[125] and no provision on costs appears in the Canadian Uniform Act.

The Commission wishes to express its concern about those cases in which a finding of contributory negligence becomes, in itself, a ground for apportioning costs. We are of the view that, while there may well be circumstances where such apportionment is justified, this power to apportion costs should not be exercised automatically, without considering all the circumstances of the case. On balance, however, the Commission has concluded that the *Courts of Justice Act, 1984* and the Rules of Civil Procedure do seem to give the court adequate power to deal appropriately with costs. Accordingly, we recommend that no express provision corresponding to section 8 of the existing *Negligence Act* should be incorporated into any new legislation.

In the case of a successful counterclaim involving apportionment, more difficult problems arise, but these are not fundamentally different in nature, it would seem, from those arising in any other case of a successful counterclaim. Rule 27.09(3), reproduced in the preceding section of this chapter, gives express power to the court to "make such order for costs of the claim and counterclaim as is just". The Irish *Civil Liability Act, 1961*[126] includes an express provision on this point:

> 42. As a general principle, but not so as to limit the judge in the exercise of his discretion, where damages are awarded on claim and counterclaim subject in each case to a reduction for contributory negligence...costs shall be awarded in the same proportions as damages.

This provision still leaves an overriding discretion in the court. In the absence of evidence that the powers of the court under the existing rules are

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what is now s. 8 of the *Negligence Act*. The Court responded as follows (at 428): "There are no special circumstances here present, and the exercise of the power in this case would involve the principle that it should be applied in every case where there is negligence on both sides".

See, also, the following cases where the plaintiff was awarded full costs despite being held contributorily negligent to some significant degree: *Stark v. Batchelor*, [1928] 4 D.L.R. 815 (Ont. App. Div.); *Wright v. McConnell*, [1953] O.W.N. 372 (C.A.); *Hogan v. Italian Mosaic & Tile Co. Ltd.*, [1927] 1 D.L.R. 1149 (Ont. H.C.J.); *Saunders v. Brown*, [1943] O.W.N. 675 (H.C.J.); and *Lusty v. Peer and DeGraw*, [1952] O.W.N. 763 (H.C.J.). In addition, see Orkin, *The Law of Costs* (2d ed., 1987), at 2-47, who states that "[t]here is...no absolute rule of law or practice which obliges the judge to apportion costs between the parties" in contributory negligence cases. Therefore, a contributorily negligent plaintiff "will be awarded his full costs in the absence of special circumstances".

[124] Alberta Report, *supra*, note 8, at 88.

[125] *Ibid.*, at 90.

[126] *Supra*, note 118, s. 42.

inadequate, and having regard to the absence of any provision in the Uniform Act, no express provision is recommended on this matter.

5. CONTRIBUTORY NEGLIGENCE AND MULTIPLE WRONGDOERS

Suppose that P, D1, and D2 are each equally responsible for a $6,000 loss suffered by P. If D1 and D2 are both sued and are both solvent it makes no difference whether P recovers judgment for $4,000 against D1 and D1 then obtains contribution to the extent of $2,000 from D2, or whether P recovers $2,000 from each of D1 and D2. Difficulties arise, however, in three situations: (1) where D2 is absent or insolvent; (2) where D1 and D2 have claims against P; and (3) where P is contributorily negligent *vis-à-vis* D1, but not *vis-à-vis* D2.

(a) Absent or Insolvent Wrongdoer

The first fact situation mentioned above, involving an absent or insolvent wrongdoer, was the subject of discussion in chapter 3 of this Report. In that chapter, we considered the principle of *in solidum* liability, whereby wrongdoers whose acts concur to cause a single, indivisible harm are each liable to the injured person for the entire amount of the damage suffered. In the course of discussing *in solidum* liability, the Commission considered the desirability, in the case of a contributorily negligent plaintiff and an insolvent or absent wrongdoer, of modifying the rule, along the lines of the American Uniform Comparative Fault Act,[127] to require the plaintiff to share the burden of insolvency or absence with other wrongdoers. For reasons set out in chapter 3,[128] we rejected this alternative, and recommended no change in the principle of *in solidum* liability, even in the case of a contributory negligent plaintiff.[129] Thus, in the abovementioned example, if P were to sue D1 alone, she would recover two-thirds of her loss ($4,000), on the basis that she is one-third to blame, and D1 would bear the risk of D2's insolvency or absence. We note that this is the position adopted by the Canadian Uniform Act.[130]

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[127] *Supra*, note 70, § 2(d).

[128] *Supra*, ch. 3, sec. 4.

[129] *Ibid*. While, under the Commission's proposals, a contributorily negligent plaintiff would not bear the risk of an insolvent or absent wrongdoer, where there are more than two concurrent wrongdoers the share of the absent or insolvent wrongdoer would be divided among the remaining wrongdoers in proportion to their respective degrees of fault.

[130] See *supra*, note 7, s. 5(1), reproduced *supra*, this ch., sec. 1(b), and s. 6, which provides that "[t]he liability of concurrent wrongdoers for damages is joint and several", that is, *in solidum*. See, also, *ibid*., s. 9, which deals with the apportionment of contribution among wrongdoers where the "contribution of a concurrent wrongdoer cannot be collected".

(b) P Liable to D1 and D2 on Counterclaims, and D1 and D2 Liable to Each Other

Professor Williams has argued that, where three parties all suffer damage in circumstances where each is partly responsible, there is a case for apportioned judgments because the calculation and entering of six separate judgments would be "an unduly complicated way of disposing of the matter",[131] and would require a party to advance money that she would have to recover subsequently from others. Arguments about complexity, however, cut both ways on this issue. Professor Williams' draft legislation for apportioned judgments, adopted in the Irish *Civil Liability Act, 1961*,[132] contains twelve subsections. It would seem that the rule of *in solidum* liability has not given rise to great difficulty in practice.[133] Perhaps most importantly, a system of apportioned judgments would be inconsistent with the position we have taken in chapter 3 with respect to *in solidum* liability. Consequently, it is recommended that the principle of *in solidum* liability should be retained and no provision should be made for apportioned damages even where three or more parties suffer damage for which each is partly responsible.[134]

(c) P Contributorily Negligent *Vis-à-Vis* D1 But Not *Vis-à-Vis* D2

Cases can be envisaged in which the plaintiff conducts herself differently towards different defendants. Suppose that the plaintiff's architect and a municipal building inspector are both responsible for a loss caused by the building of the plaintiff's house on an inadequate foundation, and that the plaintiff is partly responsible for the loss in that she negligently furnished the architect (but not the building inspector) with soil test results that related to a different site. In *Acrecrest Ltd. v. W.S. Hattrell & Partners*,[135] Donaldson L.J. said of such a case:[136]

> I can conceive of two situations in which a Court considering a claim for contribution between the first and second defendants might be concerned with the plaintiff's contributory negligence. The first is if the plaintiff has conducted himself differently towards the first and second defendants so that, for example, his loss is £1,000 but the first defendant's liability is only £250 (75%

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[131] *Supra*, note 22, at 398.

[132] *Supra*, note 118, s. 38.

[133] See *supra*, ch. 3, especially sec. 4.

[134] Draft Act, s. 4(1).

[135] [1983] Q.B. 260, [1983] 1 All E.R. 17 (C.A.) (subsequent reference is to [1983] Q.B.), overruled on other grounds by *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1985] 1 A.C. 210, [1984], 3 W.W.R. 953 (H.L.).

[136] *Supra*, note, 135, at 280-81.

> contributory negligence by the plaintiff) whereas the second defendant is liable for the full amount. If the second defendant claimed contribution, I can see it being argued with force that it would not be just and equitable that the first defendant's contribution should exceed £250 and that it should probably be considerably less.

The problem has been discussed along with analogous problems in chapter 6.[137] Our conclusion was that, supposing D2, but not D1, to have a partial defence of contributory negligence, P should recover in full from D1, that D2's liability to contribute should not exceed the extent of her liability to P directly, but that up to this limit D2 should be required to contribute in the ordinary way.

6. DOCTRINE OF LAST CLEAR CHANCE

The doctrine of last opportunity or last clear chance evolved to mitigate the rigours of the common law rule denying any recovery in cases of contributory negligence. After the introduction of apportionment, therefore, the *raison d'être* of the rule disappeared. Nevertheless, some Canadian cases held that the rule survived the apportionment Acts,[138] on the reasoning that the Acts were passed for the relief of plaintiffs, and that, where at common law the plaintiff would have been able to recover in full because the defendant had the last opportunity of avoiding the harm, the Act should be construed to enable plaintiffs to continue to recover in full. The better view appears to be, however, that apportionment seeks to do justice to both plaintiff and defendant, and where each contributes to the loss the damages should be apportioned, irrespective of the effect of the doctrine of last clear chance.

The complexities and artificiality of the doctrine, although necessary perhaps in alleviating a harsh common law rule, are additional reasons for discarding the doctrine in modern law. This is the recommendation of the Alberta Institute.[139] The Canadian Uniform Act includes the following provision:

> 3. This Act applies where damage is caused or contributed to by the Act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

It is recommended that the proposed apportionment legislation should adopt a similar provision.[140]

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[137] *Supra*, ch. 6, sec. 3(d)(ii)a.

[138] See *Seniunas v. Lou's Transport* (1971), 25 D.L.R. (3d) 277 (Ont. H.C.J.).

[139] Alberta Report, *supra*, note 8, at 10.

[140] Draft Act, s. 21.

7. IMPUTED CONTRIBUTORY NEGLIGENCE

In a number of cases, the negligence of another person is attributed to the plaintiff. The most obvious case is that of loss caused partly by the negligence of the defendant and partly by that of the plaintiff's employee. Professor Fleming has questioned the justification of apportionment in such a case,[141] but Professor Williams supports it.[142] It would seem odd to hold the defendant fully liable in a case where the plaintiff's employee damaged the plaintiff's truck, the employee being 90 percent to blame for the accident and the defendant only 10 percent. In many such cases, a claim for contribution against the employee would be worthless. In other cases, the plaintiff would feel obliged to indemnify the employee, leading to the same net result as the initial imputation to the employer of the employee's negligence. Where the plaintiff did not indemnify the employee, the consequence might be considered oppressive, and to amount to a devious means of doing what the plaintiff might hesitate or be unable to do directly, that is, sue its own employee for loss caused by negligence in the course of her duties.

Other instances where contributory negligence has been imputed are the actions for loss of an employee's services, and actions under Part V of the *Family Law Act, 1986*[143] for loss caused by death of or injury to family members.[144] In the latter case, the *Family Law Act, 1986* expressly provides that the contributory negligence of the person injured or killed reduces the claim.[145] In the Commission's recent *Report on Compensation for Personal Injuries and Death*, we recommended that Part V of the Act should be repealed.[146]

Judicial opinion has differed with respect to the action for the loss of an employee's services, but the "mainstream of Canadian authority"[147] in the analogous case of an action for the loss of a wife's services has been said to be that the action is derivative and, therefore, affected by the contributory negligence of the person injured. The action for loss of an employee's services is generally regarded as anachronistic, and its abolition has been recommended by this Commission.[148] Pending abolition, it is our view the action can best be limited by regarding it as derivative and by assimilating it,

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[141] *Supra*, note 3, at 260 *et seq*.

[142] *Supra*, note 22, at 431 *et seq*.

[143] *Family Law Act, 1986*, S.O. 1986, c. 4.

[144] *Ibid*., s. 61(1) and (2).

[145] *Ibid*., s. 61(3).

[146] Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), ch. 2, esp. sec. 4(d), and ch. 4, sec. 5.

[147] *Enridge v. Copp* (1966), 57 D.L.R. (2d) 239 (B.C.S.C.).

[148] *Report on Compensation for Personal Injuries and Death*, *supra*, note 146, ch. 2, sec. 9.

as far as possible, with an action by the injured person herself. This implies the reduction of the employer's recovery in accordance with the employee's contributory negligence.

The Alberta Institute of Law Research and Reform reached the same conclusion[149] and the Canadian Uniform Act contains the following provision:

> 5.—(2) Where a person other than a person referred to in subsection (1) makes a claim arising from the damage suffered by a person referred to in subsection (1) the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person who suffered the damage from which the claim arose contributed to the damage.

The need for such an express provision in Ontario is perhaps debatable, in that the actions for loss of a wife's and child's services and for loss of consortium have been abolished,[150] and, as we have seen, the *Family Law Act, 1986* expressly deals with the question of contributory negligence in actions within its scope. However, the action for loss of an employee's services still exists, in respect of which, it would seem, the provision in the Canadian Uniform Act confirms existing law. It is possible also that an action could be brought, at common law rather than under the *Family Law Act, 1986*, for economic loss caused by injury to a third party.[151] Accordingly, we recommend that a provision dealing with the same issue covered by section 5(2) of the Uniform Act should be included in our proposed apportionment legislation.[152]

8. FACT AND LAW

The Ontario *Negligence Act* currently provides:

> 7. In any action tried with a jury the degree of fault or negligence of the respective parties is a question of fact for the jury.

The Canadian *Uniform Contributory Fault Act* includes a wider provision:

> 4. In every action,
>
> (a) the fault or the wrongful act, if any;

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[149] Alberta Report, *supra*, note 8, at 97.

[150] *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 69(3) and (4), preserved by the *Family Law Act, 1986*, *supra*, note 143, s. 71(1).

[151] See *Graham v. Toronto Transportation Comm.*, [1945] O.W.N. 904 (H.C.J.), aff'd [1946] O.W.N. 274 (C.A.), and *Young v. Burgoyne* (1981), 122 D.L.R. (3d) 330 (N.S.S.C., T.D.).

[152] Draft Act, s. 2(3).

(b) the degree to which the fault or wrongful act of a person contributed to damage; and

(c) the amount of damages,

are questions for the trier of fact.

This provision is based on the old model Uniform Act, in force in Alberta.[153] It would seem that paragraphs (a) and (c) of the Uniform Act go beyond matters relating directly to apportionment. To say that in *every* action the fault or the wrongful act and the amount of damages are questions for the trier of fact may have the effect of altering the powers of juries generally, and will raise difficulties of interpretation in cases that have nothing to do with apportionment. Since the Commission has recommended the abolition of the civil jury,[154] there seems to be little case to be made for a general provision affecting jury powers. Accordingly, it is recommended that only a provision similar to section 4(b) should be included in the proposed apportionment legislation.[155] Furthermore, we recommend that, if the degrees to which the fault of the plaintiff and defendant contributes to the damage cannot be determined in relation to each other, they should be deemed to have contributed equally in relation to each other.[156]

9. EXISTING RIGHTS OF APPORTIONMENT

In chapter 4 of this Report, the Commission considered the effect that its proposed new statutory right of contribution should have upon any other right to contribution or indemnity that the parties may already have at common law, by statute, by virtue of a contract, or as a result of any other legal obligation.[157] In this section, we deal with the analogous issue in the context of comparative fault.

With respect to existing statutory rights of apportionment, we have come to the same general conclusion to which we came when we considered existing statutory rights of contribution, namely, that the relevant provisions in the proposed *Contribution and Comparative Fault Act* ought to govern.[158] We are of the view that these provisions establish an apportionment regime that, in principle, should supersede other statutory provisions.

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153 *Contributory Negligence Act*, *supra*, note 8, s. 5.

154 Ontario Law Reform Commission, *Report on the Administration of Ontario Courts*, Part I (1973), at 350.

155 Draft Act, s. 22.

156 *Ibid.*, s. 2(6).

157 *Supra*, ch. 4, sec. 3(c).

158 Draft Act, s. 2(7).

However, we do not wish to be doctrinaire concerning the application of our Act. Two exceptions to the general rule ought to be made. First, we recommend that the apportionment provisions of the *Contribution and Comparative Fault Act* should have primacy over any other Act that provides for apportionment, unless the other Act specifically states that it is to apply notwithstanding the proposed Act.[159]

As in the case of the contribution proposal, we believe that the preceding recommendation, if enacted, would necessitate a review of any existing apportionment legislation. Therefore, we recommend that those governmental officials responsible for the administration of other relevant Acts should review those Acts in order to determine whether their apportionment provisions ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*.

The second exception concerns the type of apportionment power that now arises under section 34(1) of the *Trustee Act*[160] and that, in its 1984 *Report on the Law of Trusts*, the Commission proposed ought to be continued in its revised *Trustee Act*.[161] Accordingly, we recommend that nothing in the proposed *Contribution and Comparative Fault Act* should affect this provision in any way.[162]

With respect to existing non-statutory rights of apportionment, the Commission has come to a different conclusion from the one adopted in the contribution context. In the latter context, we proposed that, subject to four exceptions, our *Contribution and Comparative Fault Act* ought to govern all non-statutory rights to contribution. Accordingly, rights to contribution arising at common law, for example, would be superseded under our recommendations.

As we have seen earlier in this chapter, the Commission has recommended that the proposed apportionment legislation should not be expressly extended to all breaches of contract or to breaches of a fiduciary duty, including breaches of trust.[163] This proposed limitation on the purview of our legislation was not intended to preclude the possibility of apportionment in these cases (and, indeed, in other cases not governed by statute). Rather, we recognized that, since the extension of apportionment in these areas is, or would be, very controversial, it would be preferable for the law to develop on a case-by-case basis. In this manner, the evolution of common law or equitable apportionment principles, responding specifically to the

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159 *Ibid*.

160 *Supra*, note 97. The provision is discussed *ibid*.

161 See *ibid*.

162 Draft Act, s. 23(2).

163 See *supra*, this ch., secs. 2(c)(ii)c and 2(e), respectively.

complexity of the issues in the context of breach of contract and breach of fiduciary duty—as well as in other contexts—would remain possible. Accordingly, we recommend here that nothing in the proposed *Contribution and Comparative Fault Act* should derogate from the power a court has to apportion damages apart from statute.[164]

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Subject to the following recommendations, where a person is injured by the wrongful act of one or more persons and the fault of the injured person is found to have contributed to the damage, the court should determine the degrees of fault of the person or persons and of the injured person that contributed to the damage, and should apportion the damages in proportion to the degrees of fault that are so found.

2. Subject to Recommendation 3, all torts of negligence and strict liability, as well as intentional torts, should be included within the scope of the proposed legislation governing apportionment in cases of contributory fault.

3. The question whether the new apportionment legislation should apply in the case of actions for conversion, detinue, and injury to a reversionary interest, or where the true owner has recovered the goods without the assistance of a court, should be deferred for consideration in the Commission's Project on Remedies for Wrongful Interference with Goods.

4. Apportionment should not be excluded where the plaintiff has relied on the defendant's contractual assurance of performance.

5. Apportionment should not be restricted to an unintentional breach of contract.

6. Apportionment should apply to a breach of a duty of care arising from a contract that creates a liability in damages, and, in addition, to any breach of contract that creates a liability for damages for personal injury or property damage.

7. Apportionment for loss caused by breach of contract should be subject to any agreement, express or implied.

8. Apportionment should extend to a breach of statutory duty that creates a liability in damages.

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[164] Draft Act, s. 2(7).

9. The proposed apportionment legislation should not be extended to breach of fiduciary duty, including breach of trust.

10. Apportionment should apply to all types of loss, including economic loss.

11. The proposed apportionment legislation should not deal expressly with set off and counterclaim in cases where either or both of the parties are insured.

12. The proposed apportionment legislation should not include an express provision dealing with costs of a claim or counterclaim.

13. For the reasons discussed in chapter 3, liability to a contributorily negligent plaintiff should continue to be *in solidum* even where one or more of the concurrent wrongdoers is or are absent or insolvent.

14. No provision should be made for apportioned damages, and liability should continue to be *in solidum*, even where three or more parties suffer damage for which each party is partly responsible.

15. The case where the plaintiff is contributorily negligent against one wrongdoer but not against another should be dealt with as proposed in chapter 6. (See chapter 6, Recommendation 4.)

16. The proposed apportionment legislation should contain a provision, similar to section 3 of the Canadian *Uniform Contributory Fault Act*, abolishing the doctrine of last clear chance.

17. The proposed apportionment legislation should include a provision, similar to section 5(2) of the Uniform Act, imputing the contributory fault of an injured person to a third person claiming damages arising from the injury.

18. (1) The proposed apportionment legislation should contain a provision, similar to section 4(b) of the Uniform Act, stating that the degree to which the fault or wrongful act of a person contributed to damage is a question for the trier of fact.

    (2) If the degrees to which the fault of the plaintiff and defendant contributed to the damage cannot be determined in relation to each other, they should be deemed to have contributed equally in relation to each other.

19. (1) (a) The apportionment provisions of the *Contribution and Comparative Fault Act* should have primacy over any other Act that provides for apportionment, unless the other Act specifically states that it is to apply notwithstanding the proposed Act.

(b) Those governmental officials responsible for the administration of other relevant Acts should review those Acts in order to determine whether their apportionment provisions ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*.

(2) The *Contribution and Comparative Fault Act* should be made subject to section 34(1) of the *Trustee Act* (which the Commission proposed ought to be continued in the revised *Trustee Act* recommended in its *Report on the Law of Trusts* (1984)).

(3) Nothing in the proposed *Contributory and Comparative Fault Act* should derogate from the power a court has to apportion damages apart from statute.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 1: INTRODUCTION

1: The *Negligence Act* should be repealed and a new *Contribution and Comparative Fault Act* should be enacted to deal comprehensively with the rights and obligations, as between themselves, of concurrent wrongdoers, the rights of the injured person *vis-à-vis* such wrongdoers, and the effect of the injured person's contributory fault on the issue of liability.

CHAPTER 2: JOINT AND SEVERAL LIABILITY

2. The provisions currently contained in section 149 of the *Courts of Justice Act, 1984*, as modified in accordance with the following recommendations, should be placed in the proposed new *Contribution and Comparative Fault Act*.

3. A person who has obtained judgment against a defendant should not thereby be precluded from instituting or continuing an action against another in respect of the same debt or damage for which the defendants are jointly liable.

4. (1) Subject to paragraphs (2) and (3), a person who releases a person should not thereby be barred from proceeding against any other person who is concurrently liable in respect of the same debt or damage.

(2) Where a person who settles with a concurrent wrongdoer or debtor expressly gives up his right to sue *any* person who is liable for the damage or debt, he should not subsequently be able to institute a proceeding in respect of the damage or debt against a concurrent wrongdoer or debtor who was not a party to the settlement.

(3) A person who has released a debtor should not be entitled to proceed against another who is concurrently liable in respect of the debt if the second debtor has been prejudiced by the release of the first.

(4) The payment into court rule, enunciated in *Reaney v. National Trust Co.*, should be abolished. An offer of settlement made under Rule 49 of the Rules of Civil Procedure should be treated like any other settlement. That is, a person who accepts an offer of settlement should not be precluded from continuing or instituting an action against any other person who is or may be concurrently

liable for the debt or damage in respect of which the offer of settlement was made, unless the settlement is expressly made in respect of the claim that the plaintiff may have against other persons.

5. The Parliament of Canada should be requested to enact legislation that would abrogate the judgment bar and release bar rules respecting proceedings in the Federal Court.

6. The single judgment rule should be abolished, so that the present law with respect to separate awards of damages against concurrent defendants who are severally liable would be extended to those whose liability is joint. A plaintiff should always be able to prove the extent of the loss for which a particular defendant is liable, without regard to the sum awarded to the plaintiff against another, concurrently liable defendant.

7. A person who proceeds in separate actions against two or more persons who are concurrently liable in respect of the same damage or debt should be entitled to costs only in the first action, unless that person satisfies the court that there were reasonable grounds for bringing more than one action.

CHAPTER 3: *IN SOLIDUM* LIABILITY

8. There should be no change in the law respecting the *in solidum* liability of concurrent wrongdoers to a plaintiff, even where the plaintiff is contributorily negligent.

9. Where there are more than two concurrent wrongdoers, and one wrongdoer is insolvent or otherwise unavailable to satisfy her share of liability, that share should be divided between the remaining wrongdoers in proportion to their respective degrees of fault, without discharging the liability to contribute of the defaulting concurrent wrongdoer.

CHAPTER 4: THE NATURE AND SCOPE OF THE RIGHT TO CONTRIBUTION

10. (1) Subject to the following recommendations, a right to contribution should be capable of arising among wrongdoers who cause a single loss to an injured person, irrespective of the nature of the legal obligation that gives rise to their liability in damages, and of the form of the relief that the wrongdoer has been required to provide to the injured party.

(2) The criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant

include a penal or punitive element, should not automatically bar a right of contribution. (See, also, Recommendation 37(4).)

(3) For the purpose of this recommendation, liability to restore a chattel to the injured party should be regarded as equivalent to liability to pay damages. In addition, other decrees of specific relief that discharge or reduce the liability of a concurrent wrongdoer should be capable of founding a claim for contribution.

11. The proposed statutory right should not extend to those liable for a debt.

12. (1) Subject to the exceptions recommended below, the contribution provisions of the proposed new *Contribution and Comparative Fault Act* should govern in all cases and, therefore, should supersede any other right to contribution (as distinct from indemnity), whether that right arises by statute or by any other means (including common law and equity).

(2) (a) The proposed *Contribution and Comparative Fault Act* ought to supersede all other statutory rights of contribution, as recommended in paragraph (1), unless it is specifically provided in the other statute that the contribution provisions of that statute apply notwithstanding the provisions in the *Contribution and Comparative Fault Act*.

(b) Should the proposed legislation be enacted, those governmental officials responsible for the administration of other relevant Acts should review those Acts in light of the new *Contribution and Comparative Fault Act* in order to determine whether the provisions in such Acts ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*.

(c) The proposed review of existing legislation should include a consideration of the precise meaning of any provisions concerning the right to "indemnity", having regard to the distinction, made in chapter 1 of this Report, between "contribution" and "indemnity" and the not infrequent use of the latter term in two different ways in the legislation of Ontario.

(3) The contribution provisions of the new *Contribution and Comparative Fault Act* should apply in the case of trustees and other fiduciaries, except as otherwise specifically provided by the revised *Trustee Act* proposed by the Commission in its *Report on the Law of Trusts* (1984).

(4) The provisions of the proposed new *Contribution and Comparative Fault Act* governing contribution should be subject to any express or implied contractual agreement relating to contribution made by the concurrent wrongdoers.

13. The proposed legislation should not affect any express or implied contractual or other right to indemnity, as defined in chapter 1 of the Report.

14. No person should be able to claim contribution from a person who is entitled to be indemnified by the claimant for the damages in respect of which contribution is sought.

15. A person who has a right to contribution under the proposed *Contribution and Comparative Fault Act* should be subrogated to any right that the injured person has against the concurrent wrongdoer from whom contribution is claimed.

16. The proposed new statutory provisions for contribution among wrongdoers should expressly apply to the Crown in right of Ontario and, insofar as it is constitutionally permissible, to the Crown in right of Canada.

CHAPTER 5: SETTLEMENTS AND CONTRIBUTION CLAIMS

17. Where a person who has settled the claim of an injured person claims contribution from another who he alleges is liable for the injured person's loss, it should be no defence to the contribution claim that the claimant could never have been successfully sued by the injured person. However, the court should be empowered to refuse contribution if the person claiming contribution made the settlement without believing that he was or might be liable and without regard to any legal proceedings that might be instituted against him by the injured person for the claim settled.

18. A person who settles a claim made against him by the injured person should be entitled to institute or continue a claim for contribution from those concurrently liable if the settlement provides for the discharge or reduction of the liability of the other concurrent wrongdoers to the injured person.

19. If an injured person obtains judgment against a wrongdoer, his damages should be reduced by any consideration already given to him under a settlement by another concurrent wrongdoer.

20. Where, following a settlement between the injured person and a concurrent wrongdoer, another concurrent wrongdoer has been held liable to the injured person or has settled the injured person's claim for an amount that exceeds his proportionate share of the liability, he should be entitled to claim contribution from the first concurrent wrongdoer for the excess, even though the first concurrent wrongdoer has ceased to be liable to the injured person by virtue of the settlement.

CHAPTER 6: DEFENCES TO CONTRIBUTION CLAIMS: LIABILITY TO THE INJURED PERSON

21. Where the injured person sues both the claimant for contribution and the person against whom the claim is made as co-defendants in a single action, or where, in the injured person's action against the claimant alone, the contributor is added as a third party by the claimant, both the claimant for contribution and the contributor should be bound by the findings of the court in that action.

22. (1) Where a claim for contribution is made in a legal proceeding independent of that in which judgment was awarded in favour of the injured person against the claimant for contribution, it should be no defence for the person against whom the claim for contribution is made to show that the court erred in holding the claimant liable to the injured person, except where the judgment was obtained by collusion or fraud.

(2) The recommendation in paragraph (1) should apply even where the judgment against the claimamt in favour of the injured person was on consent.

(3) (a) In the independent contribution action, the person against whom the claim for contribution is made should be entitled to show that the court wrongly assessed the quantum of the injured person's loss in the earlier action between the injured person and the claimant for contribution. Accordingly, the sum to which the contributor should be required to contribute should be determined by the court before which the contribution claim is made.

(b) However, the claimant for contribution should be estopped from arguing that the injured person's loss was greater than the amount at which that loss was assessed by the court that decided the injured person's action against the claimant.

(4) If the judgment in favour of the injured party ordered specific relief against the claimant for contribution—such as the delivery of goods or the performance of a service by the claimant—the court before which the claim for contribution is brought should be required to place a value on such delivery or performance in order to determine the amount of contribution recoverable.

23. A person who could at no time have been successfully sued by the injured person should not be liable to pay contribution to another person in respect of the injured person's loss.

24. A person whose liability to the injured person is less than that of another wrongdoer because of a contract made with the injured person

before the cause of action arose, the contributory fault of the injured person, a statute, or any other reason, should never be required to pay by way of contribution a sum that exceeds the amount of her liability to the injured person.

25. The fact that a wrongdoer's liability to the injured person is limited should be ignored for the purpose of calculating the amount that she is liable to pay by way of contribution, except for the purpose of ensuring that her liability to contribute does not exceed the amount in which her liability to the injured person was limited.

26. No recommendation made in this Report is intended to affect in any way the *Workers' Compensation Act*.

CHAPTER 7: DEFENCES TO CONTRIBUTION CLAIMS: SUBSEQUENT IMMUNITIES

27. (1) It should never be a defence to a claim for contribution for the contributor to establish that his liability to the injured person had ceased to be enforceable by reason of the failure of the injured person to comply with a procedural requirement, the expiry of a statutory limitation period, dismissal of the injured person's action for delay, or an analogous equitable bar upon a successful suit by the injured person. The contributor should not be protected from liability to contribute, even if he had ceased to be capable of being successfully sued by the injured person when that person commenced proceedings against or settled with the person claiming contribution.

(2) Should the recommendation in paragraph (1) be enacted, those governmental officials responsible for the administration of statutes requiring notice of a claim to be sent to an alleged wrongdoer should review the nature and purpose of the statutory notice requirements in order to determine whether they are of overriding importance and, therefore, whether they ought to be made to apply notwithstanding the Commission's *Contribution and Comparative Fault Act*.

28. It should be a defence to a claim for contribution for the contributor to establish that proceedings were instituted by the injured person against the claimant, or a settlement was made between them, after the expiry of a limitation period contained in a contract made between the contributor and the injured person before the latter's cause of action arose against the contributor.

29. (1) It should be a defence to a claim for contribution for the contributor to establish that judgment on the merits has already been given in his favour in an action by the injured person, except where the judgment was obtained by collusion or fraud.

(2) The recommendation in paragraph (1) should not apply where the injured person's action was dismissed for delay.

30. It should never be a defence to a claim for contribution for the contributor to establish that he had ceased to be liable to the injured person by virtue of a settlement made with, or a release or waiver of liability given by, the injured person after that person's cause of action against him arose

CHAPTER 8: THE ASSESSMENT OF CONTRIBUTION

31. Where contribution is sought on the basis of a full settlement made between the injured person and the claimant, the contribution payable by the contributor should be calculated by reference to the value of the consideration given for the settlement, which the claimant must establish it was in all the circumstances reasonable for her to give. If the claimant does not establish that the consideration actually given was reasonable, the contribution payable by the contributor should be based on the court's determination of the value of the consideration that it would have been reasonable for the claimant to have given.

32. Where the claimant for contribution has settled the injured person's claim by performing services or delivering goods, the court in contribution proceedings should be required to value these in order to determine whether the claimant has settled for a reasonable amount.

33. If a wrongdoer has settled the injured person's claim against him in such a way that the injured person may proceed against those concurrently liable with the settling wrongdoer, the contributable sum should be calculated in the way described above, but,

    (a) if a claim for contribution is made by or against the settling wrongdoer by a third party claim incidental to an action brought by the injured person against a concurrent wrongdoer, the contributable sum should be the amount of their common liability as determined by the court in that action; and

    (b) if the non-settling wrongdoer is sued by the injured person, and subsequently claims contribution from the settling wrongdoer in an independent action, the contributable sum should be the amount of the common liability as determined by the court in that action.

34. If the terms of the settlement provide for the performance of services or the delivery of goods, these should be required to be valued by the court in order to determine the amount of contribution recoverable.

35. Where the injured person has obtained judgment against concurrent wrongdoers in separate proceedings and the damages of the injured

person have been assessed differently, in a claim for contribution by one wrongdoer against another wrongdoer the court should be required to determine the sum to which the parties to the contribution claim shall contribute, without reference to the findings on damages in the earlier litigation.

36. In determining contribution among concurrent wrongdoers, the court should disregard the fact that some other person, who is not a party to the contribution proceedings, might also be concurrently liable to the injured person.

37. (1) The amount of contribution recoverable from a concurrent wrongdoer should be such as may be found by the court to be just and equitable, having regard to the degree of responsibility of each concurrent wrongdoer for the damage caused.

(2) If it is not practicable for a court to make such an assessment, each should be determined to be equally responsible and liable to pay an equal amount by way of contribution.

(3) The determination of the degree of responsibility attributable to each party to a claim for contribution should be regarded as a question of fact.

(4) While the criminal nature of the wrongdoing, the fact that it was committed intentionally or that the damages paid by a defendant include a penal or punitive element, would not automatically bar a right of contribution (see Recommendation 10(2)), such factors should be relevant to the court's exercise of its discretion over the quantum of contribution awarded.

(5) In determining the degree of responsibility of a concurrent wrongdoer, the court should be entitled to find any degree of responsibility, including responsibility for none or all of the damage.

CHAPTER 9: SOME PROCEDURAL ASPECTS OF CONTRIBUTION CLAIMS

38. A person who is claiming contribution from another who is a co-defendant in the action brought by the injured person should do so by a crossclaim in that action, in accordance with the relevant provisions of the Rules of Civil Procedure, unless the court before which the action is brought has no jurisdiction to determine the claim for contribution.

39. A person who is sued by the injured person should normally claim contribution from a concurrent wrongdoer, who is not a party defendant, by a third party claim in accordance with the relevant provisions of the Rules of Civil Procedure. However, the claimant should be entitled

to institute an independent action for contribution where the court before which the injured person's action was brought had no jurisdiction to determine the claim for contribution, or it was otherwise impracticable for the claimant to assert his right to contribution by a third party claim.

40. A person whose right to contribution is based upon a settlement of the injured person's claim should be entitled to institute or continue proceedings for contribution against a person who is or may be concurrently liable for the loss to which the settlement relates. For this purpose, "settlement" should include a settlement approved by a court and a judgment obtained by consent.

41. The limitation period governing the enforcement of the right of contribution among concurrent wrongdoers should be two years. Where the claim is based upon a judgment against the claimant in favour of the injured party, the period should run from the date of the judgment. Where the claim is based upon a settlement, the period should commence from the date when the settlement was made.

42. An order for the payment of contribution should become executable when the claimant has discharged a greater proportion of the common liability than represents his degree of fault, or when the contributor can no longer be sued successfully by the injured person. Where the claimant has not discharged his liability to the injured person, the money recovered from the contributor should be paid into court in satisfaction of the claimant's liability to the injured person.

CHAPTER 10: CONTRIBUTORY NEGLIGENCE

43. Subject to the following recommendations, where a person is injured by the wrongful act of one or more persons and the fault of the injured person is found to have contributed to the damage, the court should determine the degrees of fault of the person or persons and of the injured person that contributed to the damage, and should apportion the damages in proportion to the degrees of fault that are so found.

44. Subject to Recommendation 45, all torts of negligence and strict liability, as well as intentional torts, should be included within the scope of the proposed legislation governing apportionment in cases of contributory fault.

45. The question whether the new apportionment legislation should apply in the case of actions for conversion, detinue, and injury to a reversionary interest, or where the true owner has recovered the goods without the assistance of a court, should be deferred for consideration in the Commission's Project on Remedies for Wrongful Interference with Goods.

46. Apportionment should not be excluded where the plaintiff has relied on the defendant's contractual assurance of performance.

47. Apportionment should not be restricted to an unintentional breach of contract.

48. Apportionment should apply to a breach of a duty of care arising from a contract that creates a liability in damages, and, in addition, to any breach of contract that creates a liability for damages for personal injury or property damage.

49. Apportionment for loss caused by breach of contract should be subject to any agreement, express or implied.

50. Apportionment should extend to a breach of statutory duty that creates a liability in damages.

51. The proposed apportionment legislation should not be extended to breach of fiduciary duty, including breach of trust.

52. Apportionment should apply to all types of loss, including economic loss.

53. The proposed apportionment legislation should not deal expressly with set off and counterclaim in cases where either or both of the parties are insured.

54. The proposed apportionment legislation should not include an express provision dealing with costs of a claim or counterclaim.

55. For the reasons discussed in chapter 3, liability to a contributorily negligent plaintiff should continue to be *in solidum* even where one or more of the concurrent wrongdoers is or are absent or insolvent.

56. No provision should be made for apportioned damages, and liability should continue to be *in solidum*, even where three or more parties suffer damage for which each party is partly responsible.

57. The case where the plaintiff is contributorily negligent against one wrongdoer but not against another should be dealt with as proposed in chapter 6. (See Recommendation 24.)

58. The proposed apportionment legislation should contain a provision, similar to section 3 of the Canadian *Uniform Contributory Fault Act*, abolishing the doctrine of last clear chance.

59. The proposed apportionment legislation should include a provision, similar to section 5(2) of the Uniform Act, imputing the contributory fault of an injured person to a third person claiming damages arising from the injury.

60. (1) The proposed apportionment legislation should contain a provision, similar to section 4(b) of the Uniform Act, stating that the degree to which the fault or wrongful act of a person contributed to damage is a question for the trier of fact.

(2) If the degrees to which the fault of the plaintiff and defendant contributed to the damage cannot be determined in relation to each other, they should be deemed to have contributed equally in relation to each other.

61. (1) (a) The apportionment provisions of the *Contribution and Comparative Fault Act* should have primacy over any other Act that provides for apportionment, unless the other Act specifically states that it is to apply notwithstanding the proposed Act.

(b) Those governmental officials responsible for the administration of other relevant Acts should review those Acts in order to determine whether their apportionment provisions ought to be made to apply notwithstanding the *Contribution and Comparative Fault Act*.

(2) The *Contribution and Comparative Fault Act* should be made subject to section 34(1) of the *Trustee Act* (which the Commission proposed ought to be continued in the revised *Trustee Act* recommended in its *Report on the Law of Trusts* (1984)).

(3) Nothing in the proposed *Contributory and Comparative Fault Act* should derogate from the power a court has to apportion damages apart from statute.

CONCLUSION

In this Project, the Commission has examined the contribution rights and obligations of persons whose wrongful conduct has caused a single loss to another. The Report has also considered the rights of the injured person *vis-à-vis* such wrongdoers and the effect of the injured person's contributory negligence or fault on the extent of his recovery.

Despite the restitutionary doctrine of unjust enrichment upon which the right to contribution is based, deference to this principle is, in the case law, often haphazard. Much of the jurisprudence remains confusing, contradictory, or unsettled. Moreover, the *Negligence Act*, dealing with contribution only among concurrent "tort feasors", is unjustifiably restrictive, particularly measured against this underlying equitable doctrine. So, too, are the provisions in that Act concerning contributory "fault" or "negligence".

In attempting to assess and reform these areas of the law, the Commission has turned for guidance to restitutionary, as well as other relevant, principles. The result, we believe, is a comprehensive set of recommendations and a proposed *Contribution and Comparative Fault Act* that will bring a coherence and rationality to the law that the courts have often found difficult to achieve by means of case-by-case adjudication.

In the Introduction to this Report, we acknowledged the many persons who contributed their time and expertise to our study. We wish, once again, to express our gratitude to those persons, and, particularly, to the Project Director, Professor John M. Evans, of Osgoode Hall Law School, York University.

All of which is respectfully submitted.

James R. Breithaupt
Chairman

H. Allan Leal
Vice Chairman

Earl A. Cherniak
Commissioner

J. Robert S. Prichard
Commissioner

Margaret A. Ross
Commissioner

March 23, 1988

APPENDIX

Draft Bill

Bill 00 **198___**

An Act to revise the Law respecting comparative Fault and Contribution among Wrongdoers

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

"concurrent wrongdoer" means one of two or more persons whose wrongful acts contribute to the same damage suffered by one or more persons and includes a person who, without fault, is liable for the wrongful act of another;

"injured person" means a person who suffers damage as a result of an act or omission of a concurrent wrongdoer.

COMPARATIVE FAULT

Apportionment of fault

2.—(1) Where a person is injured by the wrongful act of one or more persons and the fault of the injured person is found to have contributed to the damage, the court shall determine the degrees of fault of the person or persons and of the injured person that contributed to the damage, and shall apportion the damages in proportion to the degrees of fault that are so found.

Application

(2) This section applies where the liability for damages arises from

(a) a tort other than conversion, detinue and injury to a reversionary interest;*

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* The questions whether the new apportionment legislation should apply in the case of actions for conversion, detinue, and injury to a reversionary interest, and whether it should apply where the true owner has recovered the goods without the assistance of a court, have been deferred for consideration in the Commission's Project on Remedies for Wrongful Interference with Goods.

(b) a breach of statutory duty;

(c) a breach of duty of care arising from a contract; or

(d) a breach of contract that results in personal injury or property damage, whether the tort or breach is intentional or not.

Recovery by third person

(3) Subsection (1) applies notwithstanding that the person making the claim for damages is not the person suffering the damage.

Agreements

(4) The apportionment of fault under subsection (1) where damage arises under a contract is subject to an agreement, express or implied.

Economic loss

(5) The damage referred to in this section includes economic loss.

Degree of fault

(6) If the degrees to which the fault of persons contributes to the damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Other powers to apportion

(7) Nothing in this section derogates from a power a court has to apportion damages apart from this section, but where the power is given by or under another Act, section 23 applies.

LIABILITY AND CONTRIBUTION OF CONCURRENT WRONGDOERS

Application of ss.4 to 19

3.—(1) Sections 4 to 19 apply where liability for damages or to deliver goods or perform services arises from,

(a) a tort;

(b) a breach of statutory duty;

(c) a breach of contract;

(d) a breach of a fiduciary duty, including a breach of trust, except as otherwise specifically provided by the *Trustee Act*;* or

(e) a breach of any other legal duty.

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* The reference in this provision is not to the present Ontario *Trustee Act*, but to the revised *Trustee Act* recommended by the Commission in its *Report on the Law of Trusts* (1984), which contains provisions dealing specifically with contribution among trustees.

(2) Sections 4 to 6 apply where the liability is for a debt, as specifically provided therein. Application of ss. 4 to 6 to debt

CONCURRENT LIABILITY

4.—(1) Each concurrent wrongdoer or debtor is liable for the damage or debt that would be assessed if the concurrent wrongdoer or debtor were the only person who is liable to the injured person or creditor. Concurrent liability of debtors and wrongdoers

(2) The total amount recoverable by an injured person or creditor shall not exceed the amount of that person's damage or debt. Maximum recovery

5.—(1) A judgment against one concurrent wrongdoer or debtor does not preclude judgment against another concurrent wrongdoer or debtor in the same or a separate proceeding. Separate actions

(2) Where a person brings separate proceedings against two or more concurrent wrongdoers or debtors, the person is not entitled to costs in a proceeding other than the one in which judgment is first given, unless the court is of the opinion that there are reasonable grounds for bringing more than one proceeding. Costs

(3) In an action brought by an injured person, the injured person may establish the amount of damages for which a concurrent wrongdoer is liable without regard to the amount of damages awarded to the injured person against another concurrent wrongdoer. Single judgment

6. A release of one concurrent wrongdoer or debtor or the acceptance of an offer of settlement does not preclude judgment against another concurrent wrongdoer or debtor, unless the release or settlement expressly so provides, or in the case of a debt, prejudices the rights of another debtor who is liable for the same debt. Releases and settlements

CONTRIBUTION

7.—(1) A concurrent wrongdoer is entitled to claim contribution from other concurrent wrongdoers whether or not his or her conduct is intentional or of a criminal nature or whether or not the damages awarded are punitive. Right to contribution

(2) A concurrent wrongdoer who is entitled to contribution from another concurrent wrongdoer is subrogated to the rights of the injured person against the other concurrent wrongdoer for the purpose of recovering the contribution to which he or she is entitled. Subrogation

Other rights to contribution or indemnity

(3) Nothing in this Act affects any express or implied contractual or any other right to indemnity, or any express or implied contractual provision respecting contribution, and in particular, no person is entitled to contribution from a person who is entitled to be indemnified, by the claimant, for the damages for which the contribution is sought.

Finding of liability and assessment of damage

8.—(1) A judgment in favour of the injured person against a concurrent wrongdoer is, for the purpose of claiming contribution from another concurrent wrongdoer who was not a party in the action or was not joined as a third party, conclusive as to the liability of the concurrent wrongdoer but not as to the assessment of the damage, except that the sum to which the concurrent wrongdoer may be required to contribute shall not be an amount greater than the amount determined by the judgment.

Idem, where two assessments of damage

(2) Where the injured person has obtained judgment against two or more concurrent wrongdoers in separate proceedings and the damage of the injured person has been assessed differently, in a claim for contribution by one of them from another of them the court shall determine the sum to which the parties to the claim shall contribute.

Amount of contribution

9.—(1) The amount of contribution recoverable by one concurrent wrongdoer from another is the amount that is found by the court to be just and equitable having regard to the degree of responsibility of each concurrent wrongdoer for the damage of the injured person.

Degree of responsibility

(2) The degree of responsibility found by a court under subection (1) may include any degree of responsibility, including responsibility for none or all of the damage.

Idem

(3) If the degree of responsibility of a concurrent wrongdoer cannot be determined in relation to another concurrent wrongdoer, they shall be deemed to be equally responsible.

Limitation on contribution

(4) A concurrent wrongdoer whose liability for damages is less than that of another concurrent wrongdoer because of,

(a) the contributory fault of the injured person;

(b) a contract made with the injured person before the cause of action arose;

(c) a statute; or

(d) any other reason,

is not liable to pay by way of contribution a sum that exceeds the amount of his or her liability to the injured person.

Effect of reduced liability

(5) Where the liability of a concurrent wrongdoer to the injured person is reduced as set out in subsection (4), the reduced liability does not affect the amount of contribution payable except as provided by subsection (4).

Insolvent wrongdoer

(6) Where there are three or more concurrent wrongdoers and one cannot pay his or her due share of the liability because of insolvency or for any other reason, that share shall be allocated to the other concurrent wrongdoers proportionately to the degrees in which they are found responsible, without discharging the liability of the defaulting concurrent wrongdoer to contribute.

Value of goods and services

(7) The delivery of goods or performance of a service by a concurrent wrongdoer in satisfying his or her liability to the injured person shall be included in a claim for contribution, and the value shall be fixed by the court for the purpose.

Determination of damages where partial settlement

10.—(1) Where a concurrent wrongdoer makes a settlement with the injured person that does not discharge the liability of another concurrent wrongdoer, the sum to which they may be required to contribute is the value of the consideration given for the settlement that is established by the concurrent wrongdoer who settled to have been reasonable in all the circumstances.

Idem

(2) Where the court is satisfied that the amount of consideration given for a settlement referred to in subsection (1) was not reasonable in all the circumstances, the court may fix the value of a reasonable consideration for the purposes of contribution.

Idem, where judgment

(3) Where, in a case referred to in subsection (1), the injured person obtains judgment against a concurrent wrongdoer who claims contribution from the concurrent wrongdoer who settled, the sum to which they may be required to contribute is the amount of the injured person's damages as determined by the court determining the claim for contribution.

Idem, where settler is third party

(4) Where, in a case referred to in subsection (1), proceedings are instituted against a concurrent wrongdoer to which the concurrent wrongdoer who settled is joined as

a third party, the sum to which they may be required to contribute is the amount of their common liability for the damage as determined in those proceedings.

Determination of damages where full settlement

11.—(1) Where a concurrent wrongdoer makes a settlement with the injured person that discharges the liability of another concurrent wrongdoer, the sum to which they may be required to contribute is the value of the consideration given for the settlement that is established by the concurrent wrongdoer who settled to have been reasonable in all the circumstances.

Idem

(2) Where the court is satisfied that the amount of consideration given for a settlement referred to in subsection (1) was not reasonable in all the circumstances, the court may fix the value of a reasonable consideration for the purposes of contribution.

Parties to action for contribution

12. In a proceeding to determine contribution between concurrent wrongdoers, the court shall disregard the existence of concurrent wrongdoers who are not parties to the proceeding.

Execution of order for contribution

13.—(1) A concurrent wrongdoer shall not execute an order for contribution against another concurrent wrongdoer until the wrongdoer claiming contribution has paid to the injured person more than his or her share of the liability or until the contributing wrongdoer can no longer be sued successfully by the injured person.

Payment into court

(2) Where the judgment of the injured person is not satisfied, any amount paid under the order shall be paid into court toward satisfaction of the judgment.

DEFENCES

Defences to claim for contribution

14.—(1) It is a defence to a claim for contribution that,

(a) the person against whom the claim is made could not at any time be held liable to the injured person for the damage;

(b) the person against whom the claim is made has ceased to be liable to the injured person by virtue of the expiration of a limitation period contained in a contract between them that was entered into before the injured person's cause of action arose; or

(c) the person from whom contribution is claimed has been held not liable on the merits in an action by the injured person.

Judgment obtained by collusion or fraud

(2) A claimant for contribution under this Act may not rely upon a judgment in a proceeding to which the person from whom contribution is claimed was not a party or was not joined as a third party where that judgment was obtained by collusion or fraud.

Defences excluded

15. A concurrent wrongdoer may recover contribution from another concurrent wrongdoer even though the person against whom the claim is made has ceased to be liable to the injured person because of,

(a) the expiration of a statutory limitation period, or the existence of an equitable defence based on delay;

(b) the dismissal of an action by the injured person for delay;

(c) the failure of the injured person to comply with a procedural requirement; or

(d) a settlement with or a release or waiver by the injured person after the injured person's cause of action arose,

whether the person against whom the claim for contribution is made ceased to be liable to the injured person before or after the time when the claimant's right to contribution arose, determined in the same manner as set out in section 18.

SETTLEMENTS

Effect of settlement on damages

16. The damages awarded to an injured person against a concurrent wrongdoer shall be reduced by the amount of consideration received under a settlement with another person against whom the injured person has made a claim for the same loss.

Recovery of contribution

17.—(1) A concurrent wrongdoer who has made a settlement with the injured person, including a settlement that is approved by a court or is the subject of a judgment obtained by consent, may institute or continue proceedings for contribution from another concurrent wrongdoer, if the

settlement provides for the discharge or reduction of the liability of the other concurrent wrongdoer to the injured person.

Idem

(2) Subsection (1) applies even though the person who is claiming contribution can be shown to have been not liable to the injured person, but the court may, in its discretion, refuse to order contribution if the person claiming contribution made the settlement without believing that he or she was or might be liable and without regard to any legal proceedings that might be instituted against him or her by the injured person for the claim settled.

LIMITATIONS

Limitation period for contribution

18.—(1) A proceeding to claim contribution between wrongdoers must be commenced within two years after the right to contribution arose.

Idem

(2) Where the claim to contribution is based on a settlement, the right to contribution shall be deemed to arise when the settlement is made.

Idem

(3) Where the claim to contribution is based on a judgment, the right to contribution shall be deemed to arise when the judgment is given.

PROCEDURE

Crossclaim

19.—(1) A claim for contribution between parties to a proceeding commenced by an injured person must be made by crossclaim in accordance with the Rules of Civil Procedure.

Third party claim

(2) A claim for contribution against a concurrent wrongdoer who is not a party to a proceeding commenced by an injured person must be by third party claim in accordance with the Rules of Civil Procedure.

Separate action

(3) A concurrent wrongdoer who has been held liable to an injured person may institute a separate proceeding to claim contribution from another concurrent wrongdoer only if the court is satisfied that it was impossible to proceed by crossclaim or impossible or impracticable to proceed by third party claim.

GENERAL

Act binds Crown

20. This Act binds the Crown.

Last clear chance

21. This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of the act or omission and failed to do so.

Fault or responsibility a question of fact

22. A question of the degree of fault or responsibility that contributed to damage is a question for the trier of fact.

Primacy

23.—(1) This Act has primacy over any other Act that provides for the same subject matter, unless the other Act specifically provides that it is to apply notwithstanding this Act.

Act subject to R.S.O. 1980, c. 539 and c. 512

(2) This Act is subject to the *Workers' Compensation Act* and section 34(1) of the *Trustee Act*.

24. The *Negligence Act*, being chapter 315 of the Revised Statutes of Ontario, 1980 and section 149 of the *Courts of Justice Act, 1984*, being chapter 11, are repealed.

Commencement

25. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

26. The short title of this Act is the *Contribution and Comparative Fault Act, 19* .